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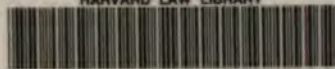
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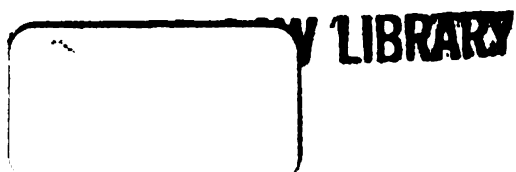
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13 VERMONT SUPREME COURT 13
REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT.

BY

EDWIN F. PALMER.

VOLUME 55.

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Rec. Feb. 8, 1884

JUDGES
OF THE
SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. HOMER E. ROYCE, CHIEF JUDGE.

| | | |
|---------------------------|---|-------------------|
| HON. TIMOTHY P. REDFIELD, | } | ASSISTANT JUDGES. |
| HON. JONATHAN ROSS, | | |
| HON. H. HENRY POWERS, | | |
| HON. WHEELOCK G. VEAZEY, | | |
| HON. RUSSELL S. TAFT, | | |
| HON. JOHN W. ROWELL, | | |

ERRATA.

Page 96, line 4, for "plaintiff," read *defendant*.

Page 109, line 5 from bottom, for "redeemed," read *reduced*.

Page 112, last line, for "1876," read 1867.

Page 171, line 7, for "frauds," read *funds*.

Page 210, line 9, for "divert," read *divest*.

Page 269, line 4, for "mortgagee," read *mortgagor*.

Page 324, line 5 from bottom, for "implicitly," read *impliedly*.

Page 353, line 9, for "imparts," read *imports*.

Page 596, line 14, for "found," read *forced*.

Powers, Taft, Rowell, JJ., held the Supreme Court for Bennington County.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTY OF RUTLAND,
AT THE
JANUARY TERM, 1888.

PRESENT :

| | | |
|---|---|-------------------|
| HON. TIMOTHY P. REDFIELD, HON. H. HENRY POWERS, HON. RUSSELL S. TAFT, HON. JOHN W. ROWELL, | } | ASSISTANT JUDGES. |
|---|---|-------------------|

IN RE BRIDGET KENNEDY, IN RE JAMES KENNEDY,
IN RE PATRICK READY.

*Criminal Trial. Appeal from Judgment of a Justice of Peace.
Bail. Certiorari. Habeas Corpus. Jury. R. L. s. 1673.*

1. A respondent in a criminal trial is entitled to an appeal to the County Court from the judgment of a justice of the peace, if claimed within two hours, although he neglects to procure the bail demanded for his appearance.
2. In such a case the appeal should be granted, and the respondent held in custody for his appearance at court.
3. The writ of *certiorari* will be issued on petition, and lie to bring before the Supreme Court for review the record of a justice of the peace in a criminal case, when the justice has refused an appeal demanded within two hours, on the ground that the respondent neglected to procure bail, and the justice proceedings quashed.
4. A respondent imprisoned under the same circumstances was discharged on writ of *habeas corpus*.
5. The jury referred to in the Bill of Rights, — art. 10, — is the common law jury of twelve men.
6. R. L. s. 1673. Right of respondent to appeal, construed.

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PETITION for writ of *certiorari*, also, for writ of *habeas corpus*.
The case is stated in the opinion.

State's Attorney, for the State.

Redington & Butler, for the petitioners.

The writ of *certiorari* should issue. 2 Pick. 172; 2 U. S. Dig. 128; 54 Barb. 589; 22 Ill. 883; 12 Ill. 143; 14 Ill. 35, 144; 9 Mich. 324; 9 Iowa, 583; 26 Ill. 243; 19 Wis. 591; 17 N. Y. L. 25.

The opinion of the court was delivered by

POWERS, J. Bridget Kennedy and James Kennedy are severally petitioners for writs of *certiorari* to quash the proceedings of a justice of the peace by whom they were sentenced to imprisonment on conviction of the offense of selling liquors contrary to law. Patrick Ready is brought up on a writ of *habeas corpus* that the legality of his imprisonment for a like offense may be inquired into.

A preliminary objection is made in the Kennedy cases by the State that the writ of *certiorari* will not lie to bring up the record of a justice of the peace in a criminal case. This objection, as it challenges the jurisdiction of this court in the premises, is to be first considered. By sec. 782, R. L. the Supreme Court is given exclusive jurisdiction to issue and determine writs of error, *certiorari*, *mandamus*, prohibition and *quo warranto*, and other writs and processes to courts of inferior jurisdiction, to corporations and individuals, that may be necessary to the furtherance of justice and the regular execution of the laws. Section 826, R. L. declares that "no judgment rendered by a justice, on the merits of a civil cause, within his jurisdiction, shall be reversed by writ of error, *certiorari*, or any other process." This is the only provision in our statutes that restricts the jurisdiction of this court over the proceedings of inferior courts; and it is to be noticed that this restriction is limited to the judgments of justices on the merits of *civil* causes. When, therefore, by sec. 782, a general jurisdiction is given the court to issue this writ to courts of infe-

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rior jurisdiction, and by sec. 826 the judgment of justices in civil cases on the merits are alone withdrawn from such general jurisdiction, a fair inference arises, that the legislature intended that all other judgments of justices of the peace should remain within the reach of this writ.

At common law the writ of *certiorari* issues for the correction of the errors of inferior tribunals of every description, whether courts or public boards, where their action directly affects the rights of others in cases where they exceed their jurisdiction or act illegally in respect to a substantial matter. Wood on Mandamus, &c., 209.

The same author says that the writ properly issues to review the proceedings of surrogates, judges of probate or of orphan courts, of justices' courts, municipal boards, or any body that acts in a judicial capacity, to correct *judicial* acts; and that it lies to justices' courts he cites cases in Tennessee, Pennsylvania and New York.

The Supreme Court of Massachusetts in the case of *Haynes, Petitioner v. Jenks*, 2 Pick. 172, entertained the writ on a petition to that court to quash the proceedings of a justice of the peace for the recovery of a penalty under the militia laws. It is true that the question of jurisdiction was not raised in this case; nevertheless, it is not presumable, if any doubt upon this question existed, that it would escape the attention of counsel, or that a court of such eminent ability and learning without objections raised, would assume to exercise such extraordinary power over the judgments of another tribunal, without a self assurance of their clear rights to do so.

Without multiplying authorities, we hold that the proceedings of justices of the peace in criminal causes may be reviewed upon this writ; and if errors of law of a substantive character apparent thereon are found to exist, the proceedings may be quashed.

Counsel for the petitioner have called our attention to several alleged errors in the records brought up—some of which are peculiar to one—others to another, of the cases, but they claim that one fatal error is common to the cases of Bridget Kennedy, James

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Kennedy and Patrick Ready ; namely, that the justice before whom these parties were tried, denied them respectively a right to appeal from his judgment to the County Court unless they first entered into a recognizance in a sum fixed ; and it is argued on the one hand that respondents before justices have an unfettered right of appeal to the County Court, and on the other that the right of appeal is conditional upon entering into the recognizance mentioned in the statute.

This question is obviously one of great importance to the due administration of justice, and has received our careful attention and examination. Section 1673, R. L., reads as follows :

“ No appeal shall be allowed in a criminal cause where the respondent is acquitted ; but the respondent may appeal from any judgment or sentence of a justice against him, if the appeal is claimed within two hours after the rendition of judgment.”

The next section provides that in criminal cases the party appealing shall at the time of the appeal, give security by way of recognizance, conditioned “ that the appellant will personally appear before the County Court, and there prosecute his appeal to effect and abide the order of court thereon ” ; and further provides, that if the appellant fails to enter his appeal in that court the appellee may do so for affirmance. Is the right of appeal by these two sections absolute or conditional ? By the first section the right of appeal is conferred in unqualified terms : “ The respondent *may* appeal from *any judgment or sentence* of a justice against him.”

The following section has no words qualifying this language. It declares that the party appealing shall give security, &c. Security for what ? Security for his personal appearance in the appellate court. He is not ordered to secure the payment of such fine as the justice has imposed, or other satisfaction of the judgment he has rendered, but security that he will personally appear before the appellate court and abide the orders that the appellate court may make in the premises.

It is clear, we think, from the language of these two sections that the legislature intended in the first to accord the unconditional right of appeal, and in the second to provide for the per-

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sonal appearance of the respondent in the appellate court. If the appellant fails to give the security required by the latter section, he is retained in custody to the end that his personal appearance in the appellate court may be secured ; and this is the only consequence that can be visited upon him for his failure to furnish the security required.

By the act of March 4, 1797, an appeal was allowed in criminal causes from the judgment of a justice with a proviso that the appellant should give security by way of recognizance, conditional,

“ That he personally appear before said County Court and there prosecute his appeal, so taken, to effect, and abide the order or sentence of court thereon, and in the meantime be of good behavior, and the party so appealing shall remain in the custody of an officer, until he, she or they shall have given such security.”

In this act the unfettered right to appeal is given ; the character of the security required is defined ; and the consequence of the neglect to give the security expressed ; namely, *remaining in custody*.

The substance of this act was carried forward in several revisions of the statutes till that of 1839, when the clause providing that the appellant should remain in custody until the recognizance be entered into, was dropped. But it is obvious that the latter clause has no relation to that securing the right to appeal, nor to that defining the character of the recognizance. It merely provided for the custody of the appellant *until* he gave the required security. Its omission, therefore, in the later revisions of the statute does not qualify or limit the *right* to appeal, accorded in the earlier paragraph of the section. Its absence in our present statute merely leaves the consequences of a failure to enter into a recognizance unexpressed ; and the legislature might well do this. Upon the issue of his warrant by the justice the respondent is taken into legal custody, and this custody legally continues till the proceeding under which the warrant issues is terminated by final judgment, unless the respondent in the way pointed out by the statute shall free himself from such custody by furnishing security that he will return into custody at the proper time. The right of respondents to give bail in all prosecutions

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except for capital offenses is given by the constitution ; and the second section of the statute under consideration determines the method by which respondents may make this right practically available. The prosecution has no interest at stake in taking the recognizance except to see that it be ample in amount and sufficiency. In the justice court the respondent is in custody to the end that the State may have him at hand to receive, do and suffer the sentence that may be imposed upon him. The appeal is taken for the purpose of obtaining a new trial upon the question of the respondent's guilt ; and if the respondent is present in the appellate court to do and suffer the sentence which that court may impose upon him, every right of the State is preserved.

If the respondent declines to furnish bail for his appearance in the appellate court, he remains in custody precisely as he stood in the justice court. If he elects to give bail for his appearance, he furnishes a substitute for that custody which the fundamental law declares sufficient. The giving of bail, therefore, is altogether the voluntary act of the respondent in the exercise of a constitutional right.

Hence, it is apparent that the section providing for a recognizance has no relation to the preceding one providing for an appeal, and cannot be read as in any sense qualifying or limiting it. The one provides for a new trial of the complaint upon its merits ; the other, a mode for the appearance of the respondent to answer the consequences of that new trial. When, therefore, we look at the course of legislation upon this subject, it is made apparent that the legislature has never undertaken to make the right to appeal dependent upon any condition whatever, except that it be demanded within two hours. Again, Article ten of our Bill of Rights declares that " in all prosecutions for criminal offenses a person hath a right to a speedy public trial by an impartial jury of the country " ; " nor can any person be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers." The jury here referred to is the common law jury of twelve men. It has many times been held by the court that if an appeal be accorded to respondents who are

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in the first instance brought to trial before justices of the peace with a jury of six men, this article of the Bill of Rights is not infringed; and it is equally clear that if no appeal is allowed, the respondent is deprived of the mode of trial given him by the organic law. It is not supposed, nor supposable, that the legislature intended to violate this provision of our constitution,—a provision that is found in the constitution of every State,—declaring a right that for centuries has been recognized and adhered to by our English ancestry with the most passionate devotion, by the enactment of the statutes under consideration. If these provisions are to be held to have such effect, they are clearly unconstitutional and void. But we are clearly of opinion that the statutes mean no such thing, and that the legislature when it declared in plain language that the respondent in criminal causes may appeal, meant precisely what it has said. This view of the statute is in accord with the obvious import of its language, the apparent justice of the case, and the obvious power of the legislature. The case of *State v. Cloran*, 47 Vt. 281, is not in conflict with the decision in this case. That case decides that the error there complained of could not be corrected on exceptions as those taken.

The careful and guarded language used by the learned judge who drew the opinion, leaves the impression that if the question had arisen under the statute involved in this case and in the manner of this case, the decision would have been different.

In the cases of Bridget Kennedy, James Kennedy and Patrick Ready, it appears by the records of the justice before us, that these respondents seasonably demanded an appeal to the County Court from the judgment rendered against them by the justice, and that the justice refused such appeal unless they furnished bail; failing to do this, the justice issued final process to carry his judgment into execution. Herein was error. The justice should have passed the cases to the County Court; and if the respondents did not find security for their appearance in that court, should have held them in custody until such security was furnished.

The petitioners being imprisoned under the judgment and sentence of the justice, are entitled to their discharge;—and it is so

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ordered. Some other questions touching the proceedings of the justice in these cases were discussed in argument, but we find it unnecessary to express any views upon them.

In the Kennedy cases it is ordered that a writ of *certiorari* be issued as prayed for, and the proceedings of the justice recited in the petition being certified to this court, the same are ordered to be quashed, and the petitioners discharged from custody thereunder.

In the case of Ready, it is adjudged that his imprisonment, under the sentence of the justice recited in the petition for writ of *habeas corpus*, is unlawful, and it is ordered that he be forthwith discharged therefrom.

DANIEL CONWAY v. JULIUS SEAMONS AND TRUSTEE.

Insolvent Law. Discharge. Constitutional Law. Merger.

1. A discharge under our insolvent law does not bar a debt contracted before its passage, the creditor in no way becoming a party to the proceedings in insolvency.
2. Nor is such debt discharged though merged in a judgment rendered after the discharge, and which judgment is the basis of this action.
3. A law discharging such debt is unconstitutional.

DEBT on judgment brought in the Municipal Court of Rutland. Judgment for the defendant. The writ was dated May 12th, 1882, and declared in debt on a judgment rendered by said court, July 5th, 1880, which last judgment was upon a judgment rendered by a justice of the peace, July 19th, 1874.

After the rendition of the judgment declared upon in this suit, the defendant filed his petition in the Court of Insolvency for the District of Rutland, and the same was duly proceeded with; and the defendant duly obtained his discharge as an insolvent debtor from all debts and claims which by law he might be discharged

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from by the Court of Insolvency ; but the plaintiff did not prove his claim, nor in any way consent to such discharge, nor in any way admit the jurisdiction of the Court of Insolvency.

Both parties resided in this State.

J. E. Manley and *G. E. Lawrence*, for plaintiff.

An insolvent law discharging a debt existing before its passage is unconstitutional. U. S. Con., Art. 1, s. 10 ; *Bixby v. Woodward*, Windham County, Feb. Term, 1882 ; 17 Johns. 108. The discharge is no bar. *Walter v. Wendall*, 19 Johns. 153 ; *Moore v. McMillan*, 54 Vt. 27 ; *Whitney v. Whitney*, 35 N. H. 457 ; 6 Wheat. 131.

P. R. Kendall, for defendant.

The contract sued upon is the judgment of July 5, 1880.

The plaintiff could elect to retain his debt as it was, or to take a new and better security subject to the provisions of the insolvency law. He could not do both. *Baldwin v. Rowell*, 52 Vt. 57 ; 15 Gray ; *Pierce v. Eaton*, 11 Gray, 398 ; *Bangs v. Watson*, 9 Gray, 211 ; *Austin v. Crowley*, 10 Met. 332 ; *Rindge v. Crowley*, 10 Cush. 43.

The opinion of the court was delivered by

ROWELL, J. A discharge under our insolvent law does not bar a debt contracted before its passage, the creditor in no way becoming a party to the proceedings in insolvency. *Bixby v. Woodward*, Windham County, Feb. Term, 1882. Under the United States Bankrupt Act of 1841, it was held in this State that a judgment on a debt existing at the time of the adjudication of bankruptcy and provable under said act, obtained after adjudication and before certificate granted, was discharged by the certificate. *Harrington v. McNaughton*, 20 Vt. 292 ; *Downer v. Rowell*, 26 Vt. 397. In these cases the court looked behind the judgments, to see what they were founded on, and gave effect to the certificates accordingly, and in favor of the debtors. *Clark v. Rowling*, 3 N. Y. 216, is to precisely the same effect. It was there argued against the bankrupt that his discharge extended to such debts

only as he owed *at the time of presenting his petition*, and that the judgment sought to be enforced did not then exist, but was rendered subsequently, and therefore was not reached by the discharge. But the court held otherwise, and said : " It is true that the notes, as evidence of an indebtedness, were merged in the judgment, which, being greater security, operated to extinguish the lesser ; but, does it therefore follow that the judgment to all intents became a new debt, and that the merger or extinguishment of the notes was so complete that, for the purpose of protecting the defendants in an equity connected with the original indebtedness, we may not look behind the judgment and see upon what it was founded ? A judgment, instead of being regarded strictly as a new debt, is sometimes held to be merely the old debt in a new form, so as to prevent a technical merger from working injustice. And this exception to the doctrine contended for by the plaintiff has obtained especially in cases of insolvency and bankruptcy, for the protection as well of the creditor as the debtor, and has been applied impartially for the benefit of both."

BRONSON, C. J., although he dissented in that case, admitted that for various purposes, courts might look behind judgments, to see what they were founded on, and instanced the case of a fraudulent conveyance by the debtor, and the passage of an insolvent or an exemption law after the contract was made on which the judgment was founded. See *Monroe v. Upton*, 50 N. Y. 593.

Massachusetts formerly held the same doctrine. *Betts v. Bagley*, 12 Pick. 572. But she has departed from it in recent cases. *Sampson v. Clark*, 2 Cush. 173 ; *Bangs v. Watson*, 9 Gray, 211 ; *Pierce v. Eaton*, 11 Gray, 398 ; *Walcott v. Hodge*, 15 Gray, 547 ; *Bradford v. Rice*, 102 Mass. 472. The decisions of the Federal Courts of Bankruptcy on this subject are in inextricable confusion, some holding that the theory that the debt is so merged in the judgment as to be extinguished has no applicability under the Bankrupt Act, and that it is not the judgment, but the debt as it existed on the day of the filing of the petition, that is provable *Brown's Case*, 3 Bank. Reg. 145, and *Vickery's Case*, *Ib.* 171 ; and others holding the contrary, that neither the debt nor the judgment is provable, that the debt is merged in the judgment,

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and that the judgment, not existing at the time of the adjudication, was not provable. *Williams' Case*, 2 *Ib.* 79; s. c., 3 *Am. Law Rev.* 374, and cases *passim*.

Bump says, page 70, sixth edition, that one or the other might be proved, but that it was not settled which. The English doctrine is the same as that of this State. In *Dinsdale v. Eames*, 2 *Brod. & B.* 8, the defendant in an action on a bail-bond, becoming bankrupt between plea and verdict, and obtaining his certificate after judgment, was discharged from the damages and costs, on the ground that the debt was contracted before defendant's bankruptcy, and might have been proved under the commission.

On the other hand there are instances of the application of this doctrine in favor of the creditor. Thus, in *Wendell's Case*, 19 *Johns.* 153, a judgment obtained after the passage of the New York insolvent law of 1813, on a debt contracted before the act, was held not discharged by a certificate under the act. Chief Justice Spencer thought that to hold otherwise would be an evasion of *Sturges v. Crowningshield*, 4 *Wheat.* 122, that a state insolvent law cannot discharge a debt contracted before its passage. *Wyman v. Mitchell*, 1 *Cow.* 316, is another instance. It was debt on a judgment rendered by the Supreme Court of New York in August, 1816. Defendant pleaded his discharge under the New York insolvent act of 1813, granted on Dec. 30, 1817. Plaintiff replied that the judgment declared on was rendered on a judgment obtained in Maine in 1814, on certain notes there made to him by the defendant before the passage of said act. The court held that although the defendant's original undertaking was so merged in the judgment that no suit could be maintained upon it, yet, that it was proper to inquire into the time and circumstances of the contract upon which the first judgment was founded, for the purpose of taking the case out of the operation of the defendant's discharge. In *Betts v. Bagley*, Chief Justice Shaw fully adopts the doctrine of that case, and says that "any other decision would carry the technical doctrine of merger to an inconvenient extent, and cause it to work injustice." In *Haggerty v. Amory*, 7 *Allen*, 458, Judge Merrick says "this is the universal rule." In that

case a discharge in bankruptcy was pleaded in bar of an action on a judgment recovered in New York before the granting of the discharge but after the commencement of the proceedings in bankruptcy, upon a debt that existed before the commencement of such proceedings, and the discharge was held a bar. But the case was put upon the ground that as the discharge might have been pleaded in bar to an action on the judgment in New York, and would have constituted a good defence there, the defendant had the same right to plead it in defence of a like suit pending in the courts of Massachusetts, where it would have the same force and effect to which it was entitled in New York. The same doctrine seems to be recognized in *Palmer v. Preston*, 45 Vt. 154, although the point of that case is, that as the record showed that the judgment was founded on a debt created by contract, and contained no suggestion of fraud, the judgment, in an action upon it, was conclusive as to the manner in which the indebtedness on which it was founded was created, and that the judgment creditor could not go behind it, to show that it was in part founded on "a debt created by fraud," for the purpose of defeating the defence of a discharge in bankruptcy.

Now if we are to look behind the judgment for the purpose of giving the discharge effect, as this court did in *Harrington v. McNaughton* and *Downer v. Rowell*, why must we not look behind it for the purpose of defeating its effect? Must not the rule "work both ways?" We see no distinction in principle between the two cases. No such distinction is made in Massachusetts, but both cases are there put on the same ground. Nor do we think that the very means adopted by a creditor to enforce his debt, valid as against the insolvent law, should be made the instrument of defeating it altogether. Besides, we think with Chief Justice Spencer, that to hold the certificate a bar in this case, would be to evade the decisions of the Supreme Court of the United States, and impair the obligation of the plaintiff's original contract.

Judgment reversed, and judgment for the plaintiff for the amount of the judgment declared on, with costs. The trustee adjudged chargeable according to disclosure.

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B. M. BAILEY v. ROBERT MOULTHROP.*

Pleading. Variance. Negligence.

1. The declaration alleged that the plaintiff's horse was placed in defendant's possession, to be agisted for reasonable reward, and that the defendant so negligently kept the horse that by such negligence the horse was gored by a bull and killed. On trial the plaintiff gave evidence, without objection, that the defendant agreed that he would not put the horse in the same pasture with the bull, but in another lot; but, that he kept them together. *Held*, that there was no variance between the proof and the declaration.
2. Distinction between an action counting on one's negligence, and one based on a breach of contract.
3. It seems that trover will not lie for not properly agisting a horse.

CASE for negligence while pasturing the plaintiff's horse. Plea, general issue. Trial by jury, September Term, 1880, Ross, J., presiding. Verdict for the plaintiff.

The plaintiff declared that:

"The said plaintiff at the special request of the said defendant delivered to the said defendant a gelding horse, the property of the plaintiffs of great value, to wit: of the value of two hundred and twenty dollars, to be by the said defendant kept and agisted for a certain reasonable reward to be paid by the plaintiff to the said defendant in that behalf, and the said defendant then and there had and received the said horse of the plaintiff for the purpose aforesaid. Yet the said defendant not regarding his duty in that behalf, afterwards, to wit: on the day and year aforesaid, at Rutland aforesaid, by himself and servants in that behalf, conducted himself so carelessly, negligently, and improperly, in and about the keeping, care, and agisting of said horse, that by and through the mere negligence, and improper conduct of the said defendant and his servants in that behalf, the said horse, belonging to the plaintiff, then and there became and was greatly gored, lacerated, torn and wounded insomuch that said horse afterwards, to wit: on the day and year aforesaid, died, and was wholly lost to the said plaintiff."

The plaintiff offered evidence tending to prove that he made a bargain with the defendant to pasture his horse for a short time; that he, the plaintiff, knew the defendant kept a bull in his pasture, and that upon his objecting to have his horse run in the pasture with the bull, it was agreed between him and the defendant, that he, the defendant, would not put the horse in the same pas-

* Heard January Term, 1881.

ture with the bull, but in another lot. The plaintiff in testifying gave the particulars of the time, places and details of the conversations in and by which defendant so agreed; how on the next morning, which was Saturday, the defendant put the horse in the same pasture with the bull, and on the following Sunday the horse was gored by the bull and killed.

The defendant offered evidence tending to show that there was nothing whatever said between him and the plaintiff as to the bull, but that the plaintiff knew that the bull was pastured in the lot in which it was agreed he was to keep the plaintiff's horse. This was denied by the plaintiff, and that the bull was a very docile animal and never known to hook horses or other animals, and that he, the defendant, allowed his own horses to run in the same lot with the bull, and they were in the said lot with the bull at the time the plaintiff's horse was killed. The defendant in his testimony admitted having had conversations with the plaintiff about pasturing the horse, as claimed by the plaintiff, but did not attempt to give any details of such conversations, but simply denied that anything was said about the bull in any of them.

The defendant requested the court to direct a verdict for him on the ground that there was a variance between the proof and the declaration, which the court refused. The court, among other things, charged the jury:

"If you find there was a special agreement between the plaintiff and the defendant, that the horse was not to be pastured in the same lot with the bull, the defendant would be then under a duty so to pasture the horse; that it would be negligence as to the plaintiff on the part of the defendant to allow the bull to run in the same pasture with the horse, and the plaintiff would be entitled to have defendant exercise the same care in this respect he agreed to, and to recover if the horse was killed through the defendant's failure to exercise this degree of care."

W. C. Dunton and Edward Dana, for defendant.

As the cause of action originated from the contract to agist, this contract must be proved as laid, whether the action is in form *ex-contractu* or *ex-delicto*. *Vail v. Strong*, 10 Vt. 457; *Wright v. Geer*, 6 Vt. 151; *Mann v. Birchard*, 40 Vt. 389.

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There was a substantial variance from the contract as laid. The condition that the horse was not to be put into the same pasture with the bull, qualified the contract. *Bank v. Downer*, 27 Vt. 482; *Vail v. Strong*, 10 Vt. 457; *Wright v. Geer*, 6 Vt. 151; *Mann v. Birchard*, 40 Vt. 339; *Gowry v. Ward*, 25 Vt. 217; *Gottleib v. Leach*, 40 Vt. 278; *Rossiter v. Marsh*, 40 Conn. 196.

Prout & Walker, for plaintiff.

When a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of an action for tort. Hence it is at the election of the party injured to sue either on the contract or the tort. Wharton on Negligence, s. 435.

The essential point of plaintiff's cause of action is the want of care or negligence of defendant as bailee of the horse. Under such circumstances a defect of allegation is not a variance. The fact being in the case that the agistment undertaken was agreed to be apart from the bull, the defendant's failure to keep the animals separate was negligence. *Dean v. McLean*, 48 Vt. 412; *Taylor v. Day*, 16 Vt. 566; *Hutchinson v. Granger*, 13 Vt. 386; *Lewis v. Pratt*, 48 Vt. 858.

The opinion of the court was delivered by

REDFIELD, J. This is an action on the case, counting on the defendant's negligence. The plaintiff avers that he placed his horse in the defendant's keeping, to be by him agisted for reward, and by defendant's negligence the horse was gored by defendant's bull and killed. In the course of the testimony the plaintiff gave evidence that the bull was mentioned as being in one of the defendant's pastures, and likely to endanger the safety of the plaintiff's horse, and that defendant agreed to keep the horse in another pasture, where he would not be exposed to that danger. This testimony was admitted without objection. After the testimony was closed, the defendant moved the court to direct a verdict for the defendant for variance between the contract proved and the averments of the declaration.

The declaration alleges that plaintiff's horse was placed in defendant's possession, to be agisted for reasonable reward, and that defendant so negligently kept said horse that by such negligence the horse was gored and killed.

I. This is a sufficient averment to show the relation of the parties, from which arises a legal *duty* to take proper care of the horse.

It is not necessary in such case to set forth all the language, in detail in the declaration by which this *relation* between the parties is proved; it is enough that the *relation* is averred, on which defendant's *duty* is founded. Nor is it necessary that all the facts alleged in the declaration are *proved*, if sufficient are proved to raise a *duty*, and a breach of it. *Hutchinson v. Granger*, 13 Vt. 86. There are certain cases arising from the sale of property with warranty; in an action for the breach of it, with an alleged *scienter*, the plaintiff may recover either on the breach of the *contract*, or for the *deceit*. But in such cases the recovery is not had for some wrongful act of the defendant after the contract, and for a breach of duty imposed by the contract, but for some fraudulent and wrongful act inducing the contract itself. In such case the contract, which is the gist of the action, must be proved, as laid in the declaration. The basis and distinctions in that class of cases is clearly stated by PHELPS, J., in *Vail v. Strong*, 10 Vt. 457. In the case of the loss of goods, by the negligence of a common carrier, if a suit is brought for a breach, alleging a contract to carry the goods and a loss of them by his negligence, or a non-delivery of the goods as required by the contract, the contract must be *proved* as laid in the declaration. But if the action is tort-wise, alleging the *duty* of the defendant to carry and deliver the goods; and that, by his subsequent negligence, they were injured or lost, there is no duty of alleging or proving any contract; for the action is wholly based on the negligent, fraudulent, or malicious act of the defendant in the discharge of a duty he owed to the plaintiff. And whether that duty arises from some deal, or contract between the parties, or is imposed by law, in an action counting strictly in tort, is not of importance.

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But it is claimed that the agreement of the defendant to keep the horse in some pasture where he would not be endangered by defendant's bull, was made important by the charge of the court, and should have been alleged in the declaration. As has heretofore been stated, sufficient is averred to show a bailment of the horse for reward ; and as a matter of law a duty was imposed on the defendant to keep the horse with care and proper attention ; if it was proved that defendant's bull was accustomed to hook horses, or had manifested that propensity, it would be negligence in defendant to allow plaintiff's horse to be exposed to the risk of being gored by the bull. So, in this case, if the evidence disclosed that plaintiff *believed* and informed defendant that there was risk, which he was unwilling to take, in such exposure of the horse to that danger, and defendant agrees to so keep the horse as to avoid that danger, then it was greater negligence in defendant to expose the horse to that risk by which the horse was lost. *Dean v. McLean*, 48 Vt. 412.

II. The plaintiff claims that recovery may be had upon the count in *trover*. The act complained of in this case was a mere *non-feasance*. The horse was not appropriated to defendant's use, nor destroyed by his *positive act*, but perished by his neglect. In *Tinker v. Morrill*, 39 Vt. 477, KELLOGG, J., has carefully collated the authorities and defined the proper office and boundaries of the action of *trover* ; and, it would seem that this case is not within its limits ; but, as we have disposed of the case on another point, that question is not important. Judgment is affirmed.

Ackley v. Fish.

L. W. ACKLEY AND WIFE v. ENOS C. FISH, JR.

Married Woman. Rents. Issues of her Real Estate when not Attachable.

1. A husband built a house on a village lot owned by his wife ; the house and lot were exchanged for a farm ; the farm was sold, and the proceeds used in part payment for another farm. The title of the three pieces of land was in the name of the wife. The farm was carried on in her name, and he had no interest in it, except that growing out of his marital relation. Held, that the hay cut on the last farm was not attachable on a debt due from the husband for materials used in building the house ; and that the statute, R. L. s. 2324, limits the right to attach the products of the wife's real estate to the products of such of her estate as has been improved by the expenditure of money or material furnished.
2. R. L. s. 2324, products of wife's real estate, when attachable,—construed.

REPLEVIN for twenty tons of hay. Plea, general issue and notice. Trial by court, March Term, 1881, VEAZEY, J., presiding. Judgment for the plaintiffs. The defendant was a sheriff, and levied an execution upon this hay, issued upon a judgment rendered July 14th, 1879, in favor of M. & O. H. Edson, against said L. W. Ackley alone, and for his sole debt. It appeared that in 1874 the said Ackley's wife owned a house lot in Rutland ; that he built a house on the lot in the winter of 1874-5 ; that the debt on which the judgment was based was for a small amount of material worth about \$27, which the said Edsons sold and delivered to said Ackley, on his own credit (he then being in good credit), but to be used in building said house, and which he put into the building of the house ; that the house and lot were exchanged for a farm ; that this farm was sold, and the proceeds used in part payment for another farm ; that the hay was cut on this last farm ; that the title of the three pieces of real estate was in the wife's name ; that this farm was carried on in her name, and said Ackley had no interest in it or any of the property on it, except that growing out of his being the husband of his wife. This suit was brought for her benefit.

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Redington & Butler, for the defendant.

The annual products of the real estate of a married woman are certainly liable to attachment for the sole debt of the husband, for labor or materials furnished for the improvement of that particular real estate improved ; and she cannot escape the liability of the annual products (for such debt) of real estate into which the improvements went, purchased with and substituted for the real estate upon which, the materials were used ; for it is in effect the same real estate.

The legislature intended it should be construed equitably, and the equity is in favor of such a construction. *Priest, Barber & Co. v. Cone*, 51 Vt. 495 ; 26 Vt. 741 ; 17 Vt. 741 ; 32 Vt. 265 ; 33 Vt. 457.

J. C. Baker, for the plaintiffs, cited *Webster v. Hildreth*, 33 Vt. 457 ; *Dale v. Robinson*, 51 Vt. 20 ; *Corning v. Lewis*, 54 Bab. 51 ; 32 Vt. 260 ; R. L. s. 2324 ; 15 Pct. 158 ; and argued substantially as the court hold.

The opinion of the court was delivered by

ROYCE, Ch. J. The defendant justified the taking of the hay replevied as deputy sheriff upon an execution in favor of M. & O. H. Edson, and against the plaintiff L. W. Ackley alone, and for his sole debt. His right to levy upon the hay to satisfy said execution depends upon the construction to be given to s. 2324, R. L. The hay, being the product of the real estate of the wife, it was exempt from the levy unless the debt evidenced by the execution was for labor or materials so furnished as to render it subject to said levy.

The material which was the consideration for the debt was not used for the improvement of the real estate upon which the hay was produced. The statute, after exempting generally the products of the real estate of a married woman from attachment or levy of execution, provides that such products may be attached or levied upon for labor or materials furnished upon or for the cultivation or improvement of *such* real estate. It is claimed

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that, it appearing that the material furnished by the execution creditor was used for the improvement of real estate which the wife once owned and which was sold and the proceeds invested in the farm upon which the hay in question was produced, it comes within the above proviso. Whether it does or not depends upon the construction that should be given to the word *such*, as it is used in said proviso. Does it refer to any real estate that may have been owned by the wife? or, is it limited to the real estate upon which the improvements have been made?

Section 15 of chap. 1, R. L. in prescribing the construction to be given to statutes, provides that the words, *said* and *such*, when used by way of reference to a person or thing, shall apply to the same person or thing last mentioned. If the word *said* had been used instead of *such*, there could be no doubt but what it would refer to the estate upon which the improvements were made. One of the definitions given to the word *such* is "same"; and that is the definition that must be given to it as it is used in the proviso to the statute. The use of the words, "the same," as the equivalent of "*such*," limits the right to attach or levy upon the products of the real estate of the wife to products of *such* of her estate as has been improved by the expenditure of money or material furnished, and is decisive against the right of the defendant to levy upon the hay replevied.

The judgment is affirmed.

Lewis v. Barker.

LEVI LEWIS v. W. C. BARKER.

Evidence.

1. The plaintiff's store while occupied by the defendant was burned. The question being whether burned by the defendant, and one of the plain'tiff's witnesses (who was the defendant's clerk, and who, the defendant claimed, set the fire) having admitted on cross-examination that he told a certain party that he had been offered \$100 to burn a building, it not appearing what building, it was held that the defendant was bound by the answer; that he could not inquire of the witness if it was true that such offer had been made; nor prove that he refused to work for him the day after the fire.
2. It was claimed that the defendant's motive in burning the building was to get the over-insurance on his goods. He had some commission goods which were not destroyed by the fire, but which he fraudulently attempted to induce the insurance company to pay for. A postal card written by the defendant to the owner of such goods, stating that they had been burned, and that the company refused payment, was admissible.

TRESPASS, for burning a store building of the plaintiff in the town of Wells. Plea, general issue. Trial by jury, September Term, 1882, VEAZEY, J., presiding; and verdict for the plaintiff.

One Spencer, a witness for the plaintiff, and the defendant's clerk at the time of the fire, on cross-examination, was asked by the defendant, if he had not stated, some time previous to the fire, in the presence of one Merrill, that a certain person had offered him \$100 to burn a building in the town of Wells, and replied that he had. The defendant's counsel then asked the witness if it was true that any person had offered him \$100 to burn a building.

The court excluded this testimony, after inquiring of the defendant's counsel if he expected to show that the offer applied to the store in question, or to any building that had been burned, and his replying, that he did not know that it did. The court also refused to allow Merrill to testify as to what the witness had stated about the offer to him.

The plaintiff rented the store to the defendant. It was claimed the goods were over-insured. Said Spencer testified, that a short

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time before the fire, there was a case of Gargling Oil in the store ; that defendant told him that it was commission goods and directed him to remove it ; that he did so, and that it was not in the store when burned. The insurance agent who adjusted the loss on the goods, testified that the defendant made claim for this oil. The court admitted a postal card written by the defendant to the owners of this oil, stating that he received it, that it had been burned, and that the insurance company refused to pay for it on the ground that it was commission goods. The defendant excepted.

Joel C. Baker, for the plaintiff.

Fayette Potter, for the defendant.

The opinion of the court was delivered by

Taft, J. The defendant claimed that Spencer, a witness called for the plaintiff, set fire to the building burned, and asked him on cross-examination, if he had not stated in presence of one Merrill that a certain person had offered him one hundred dollars to burn a building in the town of Wells, and the witness replied that he had so stated ; he then asked him if it was true, and on the plaintiff's objection, the testimony was excluded, the defendant stating that he did not know that the offer applied to the store in question, or to any building that had been burned. We do not see how the fact that the witness had been offered a sum of money by some person to burn a building not the plaintiff's and one that had not been burned, had any tendency to show that he, the witness, burned the plaintiff's store. It was wholly irrelevant, and the evidence to prove it properly excluded. It might not have been error for the court in its discretion as a part of the cross-examination of the witness to have admitted the testimony, but it was not error to exclude it. It being a collateral fact the defendant was bound by the answer of the witness, and could not contradict it, and the testimony of Merrill for that purpose rightly rejected.

The next error assigned was the refusal of the court to permit

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the defendant to show that Spencer refused to work for him the day after the fire. This testimony was not material upon any of the issues in the case; for, although "Man goeth forth unto his work and to his labor until the evening;" (Ps. civ, 23,) yet a refusal to do so was no evidence that Spencer burned the plaintiff's building.

The plaintiff claimed that the defendant had caused his goods to be largely over insured, and then burned them, and attempted to defraud the insurance companies by making claims for goods not destroyed, &c.; and the evidence tended to show this, and tended to show that he attempted to recover for Gargling Oil, that he knew was not insured, and that he knew had not been burned; although the postal card was written after the fire, we think the attempt to defraud the company into paying him for the oil, and the owners of the oil into not collecting it of him, was so connected with the main transaction as to make any part of the attempt admissible whether made before or after the fire. It was evidence relative to the scheme, which the jury found he had entered into, for the purpose of swindling the insurance companies, relative to the goods that the parties supposed were in the store at the time of its destruction. We think there was no error in permitting the card to be read; as the card was properly in evidence, the request of the defendant that it could not be considered by the jury *for any* purpose should not have been complied with. This last point is the only one insisted upon with respect to the exceptions taken to the charge.

Judgment affirmed.

GEORGE COX v. G. N. EAYRES AND ROBERT HEWITT.*

Evidence.

1. A party cannot impeach his own witness ; and *it is not in the discretion of the court* to allow him to do so, either by general evidence, or by proof by other witnesses of prior contradictory statements.
2. Proof that a witness was drunk at the time of the event to which he testifies may be introduced to discredit him.
3. When a deposition was excluded on the ground that the witness was in court, and the witness was then called, and on cross-examination testified that the plaintiff about the time of the taking of the deposition had given him a pair of shoes, and intoxicating liquor, it was *held* that the plaintiff could *repel the imputation cast upon him*, but that he could not show that the witness had made prior contradictory statements.

CASE, with a count in trespass. Plea, general issue with notice of special matter. Trial by jury, September Term, 1881. Verdict for the plaintiff to recover \$221.66. The defendant Eayres, was superintendent, and Hewitt, deputy superintendent and jailor, in the House of Correction. The count in case alleged that the defendants by their servants and agents so negligently and carelessly cut and shaved off the plaintiff's beard that he was thereby made sick, &c. ; the count in trespass alleged that the plaintiff was confined as a prisoner in said house of correction, and that defendants wilfully and maliciously, with force, &c., caused his beard to be cut and shaved off, &c. One W. H. Davis, Jr., was the colored barber who shaved off the plaintiff's beard and whiskers. The plaintiff offered in evidence Davis' deposition. The defendants objected to it on the ground that the witness was in court, and it was excluded. The plaintiff thereupon called the witness ; and his testimony tended to sustain the claims of the defendant as to the removal of the beard, and as to what was said between the plaintiff and Hewitt. On cross-examination the witness stated that the plaintiff had bought him a pair of shoes, and treated him with intoxicating liquor many times, a little while

* Heard at the January Term, 1882.

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before the taking of the deposition, and that if his deposition had been taken he did not remember it. The plaintiff denied that he furnished the witness liquor, and that he bought him any shoes; and his counsel claimed that they were surprised by the testimony, and charged that he had been under the influence of the defendants and their friends, and had been corrupted since he gave his deposition.

The plaintiff then called the notary who took and wrote the deposition of Davis, and asked him what Davis said to him when giving his deposition, as to using shears in removing Mr. Cox's beard. To this question the defendants objected, as being an attempt to impeach the plaintiff's own witness by showing he had made different statements out of court, and as calling for facts contained in a deposition over the signature of Davis. The plaintiff's counsel thereupon again offered to put in said deposition, but to this the defendants objected.

At this point and previously the counsel upon both sides in arguing the question as to the admissibility of the impeaching testimony, indulged in charges of gross unprofessional misconduct against opposing counsel respectively and of the greatest impropriety by the parties respectively in respect to their conduct with and towards the witness and the taking of his deposition.

The court thereupon said that in view of the unusual charges and what had appeared in respect to this witness, they should admit evidence tending to show what the witness then said, and what his condition was when he said it; and should do this in the exercise of discretion so far as it was a matter of discretion under the anomalous circumstances. The court thereupon overruled the said objection and admitted the question and evidence, to which the defendants excepted.

The counsel for the plaintiff then put to the notary the following question:

What did Davis say relative to Mr. Cox asking Mr. Hewitt to wait or delay the shaving? You may refer to the deposition as a memorandum.

The defendants objected to this question for same reasons as before, and also to the deposition being used to refresh the memory

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of the witness so he could swear to its contents. The court permitted the witness to examine the deposition and to answer the question, explaining that he could look at it for the purpose of refreshing his memory. The witness answered from the deposition or with it before him, as follows: "Mr. Cox says, cannot you wait till morning"? He said this to Hewitt and Mr. Hewitt says, "No, it is against the orders." To which question, testimony and ruling the defendants excepted.

The other facts are stated in the opinion.

J. C. Baker and *A. F. Walker*, for defendants.

The plaintiff called this witness to testify in his own behalf, and selected him voluntarily for that service. By calling the witness the plaintiff endorses him as being worthy of credit, and he cannot afterwards attack his veracity. Such a course would be bad faith to the court, to the jury and to the other party, and would enable the party to make a good witness for himself, if he testified in his favor, and at the same time hold the means to destroy him if he spoke against him. *Johnson v. Varick*, 7 Cow. 238; *Olmstead v. Bank*, 32 Conn. 278; *Whitaker v. Salisbury*, 15 Pick. 534; *Commonwealth v. Starkweather*, 10 Cush. 59; *Elliot v. Pearl*, 10 Pct. 431; *Adams v. Wheeler*, 97 Mass. 67; *Thornton's Exrs. v. Thornton's Heirs*, 39 Vt. 122; *Downer v. Dana*, 19 Vt. 338.

Redington & Butler and *E. J. Ormsbee*, for plaintiff.

The plaintiff, to clear himself of the untrue charges of the witness, Davis, made upon cross-examination, as well as to show how the witness had imposed upon him, as well as the court, by previously, under oath, stating differently from what he then testified, and to further show that Davis fully understood what he was doing and saying when he made his statement under oath, introduced the notary, before whom he made the statements, and also other witnesses.

The court fully realized the situation, and as a matter of discretion, allowed the plaintiff privilege. This was clearly a matter of discretion. *Thornton's Exrs. v. Thornton's Heirs*, 39 Vt. 148; 1 Greenl. Ev. s. 436-442, n. 443, 444, n.; *Moody v.*

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Rowell, 17 Pick. 498; *Wright v. Beckett*, 1 M. & Rob. 414; *Rice v. N. E. M. Ins. Co.* 4 Pick. 439; *Brown v. Bellows*, 4 Pick. 179; 2 Phil. Ev. 447-450-463; 50 Vt. 142.

Of this character was all the testimony of the witnesses on the part of plaintiff, as affecting testimony of Davis.

The question asked of the notary was to the same effect. And he had a right to refer to the deposition which was in his own hand-writing as a memorandum to refresh his memory. 16 Vt. 113; 35 Vt. 195; *Commonwealth v. Goddard*, 14 Gray, 402; 12 Cush. 98; 42 Vt. 206; 36 Vt. 652.

The opinion of the court was delivered by

ROWELL, J. The first question is, Was it competent for the plaintiff to discredit his own witness, Davis, by showing by other witnesses that he had previously made statements in conflict with his testimony at the trial? This evidence was admitted as matter of discretion, as far as it was such matter, in view of the "anomalous circumstances" of the case; and if admissible on that ground, its admission cannot be assigned for error. There has long been a conflict in the authorities on this subject; but we think that a careful examination of the cases will show that it is a well-settled general rule of the common law, not subject to be controlled by the discretion of the court, that a party cannot impeach his own witness, either by general evidence, or by proof by other witnesses of prior contradictory statements.

It seems to be pretty generally conceded that a party cannot impeach his own witness by *general* evidence of his bad character for truth; and the reasons given for the rule are, that by offering a witness in proof of his case, a party thereby represents him as worthy of belief, and that thereafter to attack his general character for truth, would be not only bad faith towards the court, but in the language of Buller, "would enable the party to destroy the witness if he spoke against him, and to make him a good witness if he speaks for him, with the means in his hands of destroying his credit if he speaks against him." Buller N. P. 297; Best Ev. s. 645; 1 Whart. Ev. s. 549; 1 Greenl. Ev. s. 442. What-

ever may be said of the reasons of the rule—and they are assailed by Mr. Phillips and by a learned writer in 11 Am. Law Rev. 261—the rule itself is well established. It is also well settled that a party is not bound by the testimony of his own witness, but is at liberty to show that facts relevant to the issue are otherwise than he has stated them to be, although the effect of such showing may be to discredit the witness. Best Ev. s. 645 ; 1 Whart. Ev. s. 549.

But whether a party could show that his own witness had made statements out of court inconsistent with his testimony in court, Mr. Best says was an unsettled point in England before the passage of the Common-Law Procedure Act of 1854, with the weight of authority in the negative. An examination of the cases will show that there is not much authority in favor of the affirmative. An early case, and perhaps the earliest, on the subject, is *Adams v. Arnold*, Holt, 299, which was trespass for an assault, wherein HOLT, C. J., “would not suffer the plaintiff to discredit a witness of his own calling, he having testified against him.” In the trial of Warren Hastings, Lord THURLOW refused to allow the prosecution to show that portions of the contents of a paper that they had introduced were not true,—a ruling at which Mr. Burke is said to have expressed his contempt with great emphasis. In that case also the Judges, in answer to a question submitted to them by the Lords, said that “where a witness, produced and examined in a critical proceeding by a prosecutor, disclaims all knowledge of any matter so interrogated, it is not competent for such prosecutor to pursue such examination by proposing a question containing the particulars of an answer supposed to have been made by such witness in another place, and by demanding of him whether the particulars so suggested were not the answers he had so made.” This case, however, goes farther in this behalf than most of the recent cases, and farther than we think the rule as now established will warrant, as will be shown hereafter. *Rez v. Oldroyd*, Russ. & Ry. 88, is much relied on in support of the affirmative of this question. But the point was not involved in the case, which was this: the prisoner was tried before Mr. Baron Graham for the murder of his father. Counsel for the prosecution, at the close of their case, observed to the Judge that they

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did not mean to call the prisoner's mother, strong suspicions having fallen on her as having been an accomplice; but the Judge thought it right, in compliance with the usual practice, her name being on the back of the indictment as having been examined before the grand jury, to have her examined, which was accordingly done. The Judge observing that the testimony given by her was in favor of the prisoner, and materially different from her deposition before the coroner, thought it proper to have the deposition read, for the purpose of affecting the credit of her testimony given at the trial. The question reserved for the opinion of the Judges was, whether it was competent to *the Judge*, under the circumstances stated, to order the deposition to be read in order to impeach the credit of the witness; and "the determination of the Judges was confined to the right of *a judge* to call for a witness' deposition in order to impeach the credit of a witness who should at the trial contradict what she had before deposed; but Lord ELLENBOROUGH and MANSFIELD, C. J., thought the prosecution had the same right."

In *Ever v. Ambrose*, 3 B. & C. 746, the question was whether the promises declared on were made by the defendant jointly with John and Samuel Baker, or only with John Baker. Defendants called Samuel Baker, to show that the promises were made by the three; but he denied that he ever was a partner, whereupon defendant's counsel, in order to prove that he was a partner, offered to read in evidence an answer in chancery of John and Samuel Baker to a bill filed against them by the defendant for a dissolution of the partnership. GASELEE, J., inclined to think that the evidence was not admissible, for that it was produced in order to contradict the defendant's own witness, but admitted it, reserving liberty, &c. By the answer it appeared that Samuel was a partner. The Judges all agreed that the answer was improperly admitted, as it was received as substantive evidence of the fact of a partnership. BAILEY, J., thought that the defendant ought not to have been permitted thus to contradict his own witness. HOLROYD, J., doubted whether the answer was admissible at all, and said it certainly was not admissible to prove generally that the witness was not worthy of credit, but that it might, per-

haps, be admissible if the effect of it was only to show that as to the particular fact sworn to at the trial, the witness was mistaken. LITTLEDALE, J., said it was not necessary to decide the question, but thought it doubtful whether the answer could be received to prove a different state of facts from what the witness had sworn to at the trial.

Wright v. Beckett, 1 M. & Rob. 414, was trespass *qua. clau.* before Lord DENMAN, C. J. The question was, whether the plaintiff had the exclusive right to a piece of marshy land. Plaintiff called a witness whose testimony was adverse to him, and who gave an evasive answer to a question touching prior contradictory statements, whereupon plaintiff's counsel were permitted to show by plaintiff's attorney that the witness had given a different account to him. Afterwards the case was argued before DENMAN C. J., and BOLLAND B., in Sergeant's Inn, and the learned Judges differing in opinion, gave separate judgments. Lord DENMAN favored the admission of the evidence. BOLLAND, B., was against it. He said he did not consider *Rex v. Oldroyd* authority on the question; that all that could be claimed for it was what ELLENBOROUGH and MANSFIELD said, namely, that they thought the prosecutor had the same right; that all doubt on this point was set at rest by *Ewer v. Ambrose*; and that with the exception of the two learned Judges in *Rex v. Oldroyd*, the authorities were uniform in establishing that a party cannot contradict his own witness but by giving evidence of facts bearing upon the issue.

Holdsworth v. The Mayor of Dartmouth, 2 M. & Rob. 153, was debt on a bond for £1249. The question was, whether the present corporation was bound by the act of the old corporation in giving the bond before the passing of the Municipal Reform Act. Defendant was obliged to call members of the old corporation who took part in giving the bond. One of them, on cross-examination, said that the transaction of giving the bond was, as far as he knew, an honest and a correct transaction. On re-examination he was asked whether he had not told defendant's attorney that it was a shameful transaction, which he denied, whereupon defendant proposed to call his attorney and ask him whether the witness had so said, to which plaintiff objected.

PARKE, B., held the evidence inadmissible, doubting at first whether, as the fact was elicited on cross-examination, the witness was not made, for this purpose, the witness of the plaintiff, and whether, as to this particular fact, not asked to in chief, the party calling him might not show that he had given a different account. He said he never had any doubt that the opinion of BOLLAND, B., in *Wright v. Beckett*, was right, if the fact were asked to in the examination in chief, but that he had become satisfied that it made no difference that the fact was elicited on cross-examination.

In *Regina v. Ball*, 8 C. & P. 745, in the course of the examination in chief of a witness called by the prosecution, counsel for the crown were not permitted, in order to do away with the effect of the evidence of their own witness, to prove that the statements made by the witness in her deposition before the magistrate were wholly inconsistent with her testimony at the trial. ERSKINE, J., said: "You cannot call a witness, or give evidence not otherwise admissible, for the purpose of discrediting your own witness"; and after conferring with PATTESON, J., he rejected the evidence. In *Regina v. Farr*, 8 C. & P. 768, Mr. Justice PATTESON would not allow counsel for the prosecution to even cross-examine their own witness as to statements drawn out on cross-examination by the prisoner's counsel, and which were claimed to be untrue, and not to have been testified to before the examining magistrate.

In *The Lachlibo*, 14 Jur. 192, s. c. 1 Eng. Law & Eq. 645, Dr. LUSHINGTON, on having the authority of the Ecclesiastical Courts passed upon him for the admission of this class of testimony, said that he did not find that those courts had admitted such evidence save in the peculiar cases of what are called "subscribing witnesses," and that he entertained the opinion that in that class of cases there existed a very substantive distinction in their proceedings. In commenting on *Wright v. Beckett*, he said the case amounted to permitting a party to do in another mode what he was not permitted to do in a straightforward way, namely, to discredit his own witness by general evidence, and that if he was compelled to choose between authorities, great as that of Lord DENMAN was, he should give his opinion in support of the determination of BOLLAND, B., and that all the authorities, with the

exception of two, were in favor of the view taken by him, and that those two cases, which he did not think rightly fell within the subject he was discussing, were criminal cases, and touched upon the question of looking at the depositions given before the magistrates, and allowing them to produce an effect on the jury. *Melhuish v. Collier*, 15 Q. B. 878, is probably the last English case on this subject, as the question was soon after set at rest by the Common-Law Procedure Act. It was there held that a party might examine his own witness touching prior contradictory statements, not for the purpose of discrediting the witness, but of reminding him, and getting him to correct himself if he would. Although the exact point under discussion was not raised in that case, yet PATTESON and COLERIDGE, JJ., say that there is a distinction between asking questions of a witness in the box as to statements he may have formerly made, and calling other witnesses to say, in contradiction to him, that he made such statements. EARLE, J., said the point was one on which judges had differed, and that opinions might vary to the end of time.

This question has been settled in England by the act referred to, whereby it is enacted that "a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the Judge, prove adverse, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony; but, before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statements." The Scotch law on this subject is defined by 15 & 16 Vict. c. 27, s. 3, whereby it is enacted that "it shall be competent to examine any witness who may be adduced in any action or proceeding as to whether he has on any specified occasion made a statement on any matter pertinent to the issue, different from the evidence given by him in such action or proceeding; and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified."

The great weight of American authority is against the admission of such evidence. Mr. Greenleaf does not express his opinion on the subject, but says that the weight of authority seems to be in favor of allowing a party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify, or that the witness has recently been brought under the influence of the other party, and has deceived the party calling him. 1 Greenl. Ev. s. 444. But Judge REDFIELD, in his edition of that work, thinks the text goes too far, and that the party should be limited to inquiring of the witness as to his prior contradictory statements, and this, for the purpose of setting himself right before the court, and of showing the witness that he is in error, and getting him to correct himself. Mr. Wharton says, that while a party may contradict his own witness, though it may discredit him, he is not, ordinarily, permitted to impeach him, even though called afterwards by the adverse party, either by general evidence or by proof of prior contradictory statements, and he cites many American cases in support of the text. 1 Whart. Ev. s. 549. The writer of said article in the Am. Law Rev., in his edition of Steph. Dig. of the Law of Ev. 188, published just after that article was written, in speaking of the English statute, says there seems to be no good reason why such proof may not be given whether the Judge is or is not of opinion that the witness is hostile; but that, unless by statute in some of the States, such evidence has not, generally, been regarded in this country as admissible. In *Ellicott v. Pearl*, 10 Pet. 432, Judge STORY treated it as clear that a party is not at liberty to discredit his own witness by showing his former declarations on the same subject. In *Bullard v. Pearsall*, 58 N. Y. 230, it is said that there is a great weight of authority sustaining the position that a party cannot discredit his own witness by proof of prior contradictory statements, but that he may be allowed to examine the witness touching such statements, for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of his ap-

parent inconsistency, as well as for the purpose of showing the circumstances that induced the party to call him, but that, should the witness deny having made such statements, it would not be proper to allow such statements to be shown by other witnesses. See, also, *Coulter v. Express Co.*, 56 N. Y. 585, and *Pollock v. Pollock*, 71 N. Y. 137, 152.

In *Adams v. Wheeler*, 97 Mass. 67, it was held that a party could not be allowed to prove by other witnesses statements previously made by a witness called by himself, inconsistent with his testimony at the trial, that would not be admissible as independent evidence and could have no effect but to impair the credit of the witness with the jury. In 1869 the common-law rule was abrogated in Massachusetts by an act taken almost *verbatim* from the English statute, omitting the words, "in case the witness shall in the opinion of the Judge prove adverse," and the limitation of the right to prove inconsistent statements by "leave of the Judge" only. We have been referred to *Thayer v. Gallup*, 13 Wis. 539, as supporting the position contended for by the plaintiff, but the point was not involved in that case.

The case of *Fairchild v. Bascomb*, 35 Vt. 398, is in point. There a witness called by the plaintiff, having testified in chief that at a certain time he drew a will for Mrs. Clark at her request, was asked on cross-examination whether he did not draw that will at the request of John W. Bascomb, and whether he did not so testify before the Probate Court at a time and place named, all which he denied. The defendant was thereupon allowed to show that he did so testify before the Probate Court. This was held error, on the ground that the subject of the defendant's inquiry was new matter, as to which he made the witness his own, and hence could not impeach him by showing his prior contradictory statements.

In *Thornton's Exrs. v. Thornton's Heirs*, 39 Vt. 122, the general rule was recognized, but an exception thereto was allowed in the case of witnesses to the execution of a will, which the law compelled the proponents to call; and this is a well recognized exception by all the authorities.

We think that the "anomalous circumstances" of this case do

not take it out of the general rule. The plaintiff was properly allowed to repel the imputations that his witness had cast upon him, but the inquiry went too far when he was allowed to show the witness' prior contradictory statements. Such evidence could have no other effect than to discredit the witness, and show him to be unworthy of belief; and we prefer to adhere to what we deem to be the well-settled rule of the common law on this subject, and leave it to the legislature to determine whether a different rule shall prevail, rather than follow the lead of those who would disregard the rule as not founded in reason.

The testimony to show that Hewett was "somewhat intoxicated" when on his way to the House of Correction just before the shaving, was properly admitted. He had deposed as to what took place in the guard-room at the time of the shaving, and the evidence of his intoxication was admitted as bearing on the state of his mind at that time, the accuracy with which, in that condition, he would be likely to observe and remember what in fact did take place, and the credit due to him as a witness. This is analogous to what was done in *Fairchild v. Bascomb*, where it was held competent to show that a witness was still affected by a disease of the brain that he had had a year before, as tending to show that his memory and judgment were less to be relied on than if he possessed full mental health and vigor. The degree of intoxication went only to the weight of the evidence, not to its admissibility. Wharton says that proof that a witness was drunk at the time of the event to which he testifies may be introduced to discredit him. 1 Whart. Ev. s. 418. See *Hartford v. Palmer*, 16 Johns. 143. It may be shown, also, that a witness was under the influence of opium when he testified or when the litigated event occurred. Indeed, stupefaction from any cause may always be shown to affect credibility. 1 Whart. Ev. s. 401.

As to the exclusion of Gorry's testimony, the exceptions do not disclose anything on which error can be predicated. It does not appear what reply plaintiff made to Gorry's question, so we cannot determine whether the evidence was competent or not.

The members of the court who were present at the January Term, 1881, when this case was before the court, think that the

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other questions raised by the exceptions were then determined against the defendants, and the reasons stated somewhat at length in an oral opinion by the late Chief Justice. We treat those questions, therefore, as *res judicata*, without undertaking to give the ground and reasons of the decision.

Judgment reversed, and cause remanded.

EDWIN GIFFORD v. C. C. WILLARD.

*Statute of Frauds. Filing Pleas out of Time. Evidence.
Pleading.*

1. If one makes a verbal contract for the sale of his farm, and then repudiates it, he cannot invoke the aid of the Statute of Frauds to enable him to retain what he received under such contract.
2. Filing pleadings out of time is a matter of discretion with the County Court, and not revisable by the Supreme Court.
3. The defendant pleaded an offset; the plaintiff filed what he called a "replication in estoppel"; the defendant traversed it; and the court decided that the replication and proof did not make out an estoppel. *Held*, that the evidence being pertinent to the issue thus formed was admissible; and that it was not like the admission of improper evidence and then attempting to charge it out.
4. The plaintiff admitted that the defendant was entitled to recover \$5 under his plea in offset; the jury returned a general verdict for the plaintiff for \$8.50, and a special verdict that defendant recover nothing. A motion was made in the County Court to set aside the verdict and for a new trial, which was denied. The judgment below was affirmed.

GENERAL ASSUMPSIT. Pleas, general issue and offset. Replication similiter, general issue, and two special replications; rejoinder similiter and traverse of special replications. Trial by jury, March Term, 1882, VEAZEY, J., presiding. A general verdict for the plaintiff to recover \$8.50; a special verdict that defendant recover nothing under his plea in offset; also, the jury found specially that the contract was as claimed by the plaintiff. The plaintiff's specification contained an item of

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\$105.45 for boarding the defendant; the defendant's specification contained an item of \$107.12 for rent of farm. As to the rent the plaintiff's special replication set forth that his occupancy of the defendant's farm was under a verbal contract by which the defendant bargained to sell to the plaintiff his farm for the consideration of ten years' board and lodging to be furnished the defendant by the plaintiff, and to pay taxes, &c.; that the plaintiff had partly performed his part of the contract, and was ready and willing to perform the rest; that the defendant agreed to execute a written instrument expressing the said contract, and failed to do so, but on the contrary, brought an action of ejectment against the plaintiff before a justice of the peace; that there was a trial by jury in said justice court, and verdict and judgment thereon for the present plaintiff, the issue being whether he was lawfully in possession under said contract; that the defendant appealed, but did not enter his cause in the County Court, and paid the plaintiff his costs;—by reason of which the defendant ought not to recover for said rent. The plaintiff's evidence tended to sustain his special replication, and specification.

The defendant claimed that the Statute of Frauds was a bar to a recovery by the plaintiff for the board, &c., and objected to all evidence bearing on this matter. The defendant's evidence tended to show that the contract was simply to lease for one year with an agreement about renewal, if the parties agreed, to be paid for by boarding the defendant. The plaintiff, subject to objection and exception, put in evidence the record of the justice judgment referred to in the replication, and proved payment of the costs. The court held that the replication and proof upon the issue made did not make out an estoppel. Several of the pleadings were filed out of time by leave of court. The defendant filed an amended plea in offset after the case was reached for trial. Thereupon the plaintiff by leave of court filed what he called a "replication in estoppel." The other facts are stated in the opinion.

Hunton & Stickney, for plaintiff.

P. R. Kendall and *W. W. Stickney*, for defendant.

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The opinion of the court was delivered by

ROWELL, J. The defendant having repudiated his verbal contract for the sale of his farm to the plaintiff, cannot invoke the aid of the Statute of Frauds to enable him to retain what he received of the plaintiff under it, and in part performance thereof. *Hawley v. Moody*, 24 Vt. 603.

The filing of pleadings out of time is a matter of discretion, and the action of the County Court in that behalf is not revisable here.

Proof of the justice's judgment was pertinent to the issue formed by traversing the replication to the plea in offset, and its admission was not error. It is not like the admission of improper evidence and then attempting to charge it out.

It does not affirmatively appear that defendant was disallowed the five dollars loaned, which plaintiff admitted he was entitled to recover. The jury returned a general verdict for plaintiff for \$8.50, and a special verdict that defendant recover nothing under his plea in offset. The statute required the jury to find such sum as should be in arrear from either party, and we cannot say they did not do it. This matter was brought to the attention of the County Court by a motion to set aside the verdict and for a new trial, which the court denied. It must be presumed, therefore, that that court was satisfied that no error of this kind had been committed, and that defendant had in fact been allowed the \$5.00, although the special verdict did not indicate it. That court could determine much better than we can how that was, and it is better that the matter be left where it is rather than that hostilities be renewed over so small an affair.

Judgment affirmed.

Holmes v. Reynolds.

JOHN HOLMES v. ELLEN REYNOLDS AND HENRY REYNOLDS.

Action against Husband and Wife sustained on Demurrer for Debt of Wife contracted in another State.

Conflict of Law—R. L. s. 232.

1. A count in general assumpsit against husband and wife jointly is held good on demurrer.
2. Also, a special count, alleging an indebtedness contracted by the wife during coverture, in another State, by whose laws she had the legal capacity to contract, to carry on business, and to bind herself in payment; that the debt was for goods delivered to the wife; and that in consideration thereof both defendants promised to pay.
3. A married woman carrying on business in her own name, by Statute R. L., 2321, may sue and be sued.
4. Where the wife may contract, the husband is not liable by virtue of his marital relation; but may be by his joint promise.
5. CONFLICT OF LAW. A law valid where made is valid everywhere; hence, the contract of a married woman, made in another State and valid there, is held valid here.

ASSUMPSIT with a general and a special count. Heard, on demurrer, March Term, 1881, Rutland County, VEAZEY, J., presiding. Demurrer sustained.

SPECIAL COUNT.

“ And now the said plaintiff by his attorneys comes and further declares against the said defendants, in a plea of the case for that the said defendants at Boston, aforesaid, were indebted to the plaintiff in the sum of fourteen hundred dollars for so much money before that time had and received by the said defendants to the plaintiff's use, and also in the like sum for divers goods, wares and merchandise of the plaintiff before that time delivered the said Ellen to sell on commission at defendant Ellen's request; all which indebtedness was contracted by the said Ellen, who was then and still is the wife of the said Henry Reynolds in Boston, in the commonwealth of Massachusetts, and where, under the laws of that State, she had a legal capacity to contract said indebtedness and to carry on business, and to bind herself to the payment thereof: and in consideration thereof the defendant then and there promised the plaintiff to pay him the said sum on demand,

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yet, although the said defendants became liable to pay said sum, and have been requested to do so, have not paid the same, but neglect and refuse so to do, all which is to the damage of the plaintiff fourteen hundred dollars."

Prout & Walker, for the plaintiff.

In 1880, after the contracting this debt, the legislature of this State passed an act authorizing married women to carry on business, which makes them liable for their debts as though unmarried. R. L., s. 2321.

This statute is remedial, and has a retroactive effect, as it does not touch then existing rights, but merely removes a disability under which married women labored at common law. *Stocking v. Hunt*, 3 Denio, 274; *Huett v. Wilcox*, 1 Met. 154; 1 Kent Com. 455; 23 Vt. 427; 7 Vt. 487.

What then is the legal effect of this state of affairs and as applicable to this action? We think the question is determined by *Milliken v. Pratt*, [Mass.] 7 Reporter, 590; *Hobart v. Johnson*, 12 Reporter, 104; *Adams v. Charter*, 10 Reporter, 260; *Wright v. Remington*, 8 Reporter, 369; *White et al. v. Waite*, 47 Vt. 502; *Spooner and Wife v. Reynolds*, 50 Vt. 487.

J. C. Baker, for the defendants.

The joint promise of a husband and wife upon a consideration arising during coverture, creates no joint indebtedness, and does not bind the wife to any liability. 1 Binn. 575; 49 N. H. 314; 44 Vt. 442. If husband and wife are improperly sued jointly, action fails. 1 Chit. Pl. 66, 68, (16 Am. Ed.) Declaration bad on demurrer. *Toby v. Smith*, 15 Gray, 835. A court of equity may charge the separate property of the wife with her debts contracted in her separate business. 44 Vt. 462; 31 Vt. 671; but not a court at law. *Morse v. Tappan*, 3 Gray, 411. Husband not liable for debt contracted solely on credit of wife. *Carter v. Howard*, 39 Vt. 106; *Bugbee v. Blood*, 48 Vt. 497. Promise by husband to pay such debt of wife void for want of consideration. *Cole v. Shurtleff*, 41 Vt. 311; 107 Mass. 437. The *lex fori* governs as to the remedy. *Carter v. Page*, 8 Vt. 146; *Sco-*

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ville v. Canfield, 14 Johns. 338 ; 12 Vt. 464 ; 22 Vt. 191.

The statute of 1880 gives no sanction to this action. It empowers a court of law to render a judgment against a married woman, &c. ; but it does not charge the husband with the debts of her separate business ; nor, authorize a joint action.

The opinion of the court was delivered by

TAFT, J. The questions in this case arise upon demurrer to the declaration. The defendants are husband and wife. The original declaration is in the common counts in assumpsit. Under them a recovery can be had for a joint ante-nuptial debt ; it is therefore good upon demurrer.

The new count alleges an indebtedness contracted by Ellen, at Boston, in the State of Massachusetts, for merchandise, and while she was the wife of the defendant Henry ; that under the laws of that State she had the legal capacity to contract said indebtedness, and to carry on business, and to bind herself to the payment of such indebtedness ; and that in consideration of such indebtedness the defendants promised to pay the same ; it alleges a joint promise to pay an indebtedness contracted at the time of the promise by one of the promissors. The chief contention in this case is as to the liability of the defendant Ellen. The facts alleged are admitted by the demurrer. The count sets forth a contract valid where it was made ; and being valid there, it is by the general law of nations, held valid everywhere, by the tacit or implied consent of the parties. Story on Con. of L., sec. 242, (1). The validity and interpretation of contracts are governed by the laws of the country where they are made, *Wilcox v. Hunt*, 13 Pet. 378 ; but the remedy must be administered according to the *lex fori* ; pursued by the means which the law points out where the action is brought. Story on Con. of L., chap. XIV. Contracts are not, *proprio vigore*, of any efficacy beyond the territory of the State where made ; the effect given them elsewhere is from comity, not of strict right. How far that comity ought to extend is left to the courts in the jurisdiction where the remedies are sought. It does not prevail where the contract is in violation of the laws, in that jurisdiction, of God, or nature, against good

morals, religion, public rights, or public policy : but no such question, unless the one of public policy, arises in this case, as we presume the transaction was a legitimate one. The only question as it seemed to us which can arise is the one whether it is against public policy to enforce such a contract. By the strict rules of the common law there was an utter incapacity on the part of the wife to enter into any contract ; but the tendency of modern legislation is to remove such incapacity and empower her to make contracts the same as if sole ; and in this State, at the time this suit was brought, a married woman was vested by statute, No. 105, Acts of 1880, with the power of carrying on business in her own name, and bringing suits, (and was liable to be sued,) in connection therewith, the same as if unmarried ; in fact, of making the very contract which is sought to be enforced in this action ; and the law also provided the remedy to enforce such a contract. Our law therefore permitting such contracts, and enforcing them, there is no principle of public policy which should prevent maintaining the action. The contract alleged being a valid one, obligatory upon the defendants, and not falling within any of the exceptions relating to the remedy, should be enforced by the courts of this State. This same doctrine has been held by the courts of our sister States in *Milliken v. Pratt*, 125 Mass. 374, and *Wright v. Remington*, 41 N. J. L., 48.

Where the wife has the capacity to contract independently of her husband, he would not be liable by virtue of his marital relations upon contract entered into by her, but there is no reason why he cannot jointly contract with her in all cases where she has the capacity to contract, and as the new count alleges a promise by both defendants, based upon a valid consideration, viz., a sale of goods to the defendant Ellen, it is sufficient upon demurrer.

The judgment of the County Court is reversed, but at the request of the defendants the cause is remanded for them to answer over.

THOMAS BROWN v. SCHOOL DISTRICT.

School Teacher. Voter. Committee.

1. It is not necessary if one is exempt from taxation that his name be on the grand list, to be a voter in a school meeting.
2. A school committee can make a legal contract, and thereby bind the district, for a teacher's board, although the district voted at the annual meeting that the teacher should "board around in proportion to the grand list."
3. The court do not apply the rule, that public officers can not contract with themselves to a school committee; but hold, that, for boarding the teacher, or, furnishing supplies, &c., if there is no fraud, they can recover of the district—on a *quantum meruit* or *valebant*.

ASSUMPSIT. Heard on a referee's report, September Term, 1881, VEAZEY, J., presiding. Judgment for the plaintiff to recover the smaller sum named in the report. The referee found, that school district No. 9 in Clarendon, at its annual meeting in 1878 elected three committee men, one of whom was the plaintiff; that two of the committee contracted with him for his minor son, J. M. Brown, to teach the school in said district, and board at his house, and pay him \$60 for teaching and \$15 for board; that the son taught the school, rendering efficient service to the district, and boarded at home; that the plaintiff had received therefor only \$50.35; that at said annual meeting the district voted "in respect to boarding the teacher for the year ensuing: 'To board around in proportion to the grand list.' " The referee found that if the plaintiff could recover for the board he was entitled to \$29.08; but if not, to \$11.88. The other facts are stated in the opinion.

Prout & Walker, for the plaintiff.

A prudential committee, acting in good faith, has the right to furnish wood, supplies, teachers, or any thing else within the line of his duty to provide, and collect pay for the same on a *quantum meruit*.

The contract, however, was made by the two other committee

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men, and was entire. *Goodwin v. Perkins*, 39 Vt. 598; *Norton v. School Dist.* 37 Vt. 521.

Joel C. Baker, for the defendant.

The committee can not control the school house against a vote of the district, except to keep the district school. *Chaplin v. Hill*, 24 Vt. 528; *Russell v. Dodds*, 37 Vt. 497; or, employ counsel to defend a suit. *Harrington v. School Dist.* 80 Vt. 155; 36 Vt. 693. Public officers cannot contract with themselves. *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Picket v. School Dist.* 3 Am. 105; Story Agency, s. 210. One of the committee was not a voter, and therefore ineligible. *Woodcock v. Bolster*, 35 Vt. 632.

The opinion of the court was delivered by

TAFT, J. I. The first objection made to the plaintiff's recovery is, that Tiernan, one of the prudential committee, who made the contract under which the plaintiff claims, was not a voter in the district, and therefore ineligible to an election. The referee reports that his name was not on the preceding grand list. Notwithstanding this fact he may have been a voter. All persons, being otherwise qualified, who are exempt from taxation for any cause, are legal voters; so that a person may be a voter if his name is not on the grand list. There are many instances of such exemptions. The fact that he was not a voter does not appear and the question made is not in the case.

II. The vote for the teacher to board around in proportion to the grand list was not authorized by the statute, which provides that all expenses incurred by a district for the support of schools shall be defrayed by a tax upon the grand list. We think this means a tax payable in money. The district making no legal provision for the teacher's board, the committee were authorized to make the contract in question.

III. The defendant contends that the contract for the teacher's board was null, upon the ground that it was made with a member

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of the committee. The majority of a joint committee have power to act, R. L. s. 3, but can they contract with one of their own number? There are cases in this State that seem to indicate that agents of corporations have authority to pledge to each other the corporate credit of such bodies. The earliest case is that of *Geer v. School District in Richmond*, 6 Vt. 76, where a committee was appointed to repair the school house, and the plaintiff as one of the committee, furnished materials and labor in such repairs, and the question was, whether he could sue separately for the same, or whether the suit should have been brought in the name of the whole committee. The case did not depend upon the question whether a contract made with one of their number was valid or not; the committee were appointed to repair the house, that is, furnish the materials and labor, and had they done so jointly, no question would have arisen. The committee had the right, under the vote appointing them, as is stated by PHELPS, J., in his dissenting opinion "themselves to do the repairs" and what they could do jointly, they could direct one of their number to perform; so that as we have already stated the question of the right of agents or committees to contract with one of their own number did not arise; and it is error to cite the case as sustaining such a proposition. In *Sawyer v. Meth. Epis. Society in Royalton*, 18 Vt. 405, the plaintiff was one of a committee appointed by the defendant to "superintend the building of" a meeting house; and his account was for expenses, disbursements and services rendered by him, as such committee. Such an account he would have a right to recover if it accrued with the consent of the committee, by virtue of the articles of the association and the vote appointing him. The learned Judge who drew the opinion says "the committee for aught we perceive, might as effectually bind the society by a contract concluded with one of their own number, as with a stranger." This might have been true had the committee the power under the authority conferred upon them to furnish the materials and labor for the construction of the house; but not true if their only power was to contract for them on behalf of the society. The case did not stand upon the right of the committee to contract with one of their number; the question did not arise

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upon the exceptions, was not argued by the counsel, and the remark of the court above quoted was *obiter dictum*.

Rogers v. Danby Universalist Society, 19 Vt. 187, is the last case in mind which apparently sanctions the doctrine, and the court say that it must be considered as definitely settled by the cases of *Geer v. School District*, and *Sawyer v. Meth. Epis. Society*, *supra*. As we have already shown, and as will be readily seen by an examination of the cases, the question did not arise in either case, neither did it in the last case cited, that of *Rogers v. Danby Univ. Soc.* In this latter case the plaintiff's account was "for services rendered and advances and payments made by him, as one of the trustees, on liabilities, created by the trustees, against the society, for building the house." It does not appear that any contracts were made by him with the trustees, of which he was one, but on the contrary the exceptions show that his claim was for services as a trustee, and payments made by him as such, upon contracts made by the trustees, as is evident from the statement of the case,—with strangers. We think the true rule, is, that a committee may do by one of their number what they have a right to do themselves, and for all things properly done or furnished by one, or all jointly, there can be a recovery on a *quantum meruit* or *valebant*. We do not understand that it has been decided in this State that a committee with authority only to contract have power to enter into agreements with themselves.

Under the statute s. 515, R. L., it is the duty of the prudential committee to provide fuel, furniture and all appendages and things necessary for the school; and if they furnish such supplies for the district, their value should be paid for, and such items may well include the board of the teacher. In *Norton v. School District*, 37 Vt. 521, the committee recovered for wood furnished by him, and in this case we think the plaintiff should recover for the board furnished the district, not by force of the contract alone, but by virtue of the obligation resting upon him under the statute. It is clear that no fraud was practiced upon the district, as the price charged, ninety-four cents, was much less than the delinquent board was bid off for, viz: two dollars and fifty cents per week. No question is before us on the exceptions as to the wages of the

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teacher. Judgment reversed and judgment for the larger sum named in the report.

W. H. B. OWEN v. STATE OF VERMONT.

Recognizance.

A record of a justice of the peace showing a recognizance cannot be contradicted.

PETITION to bring a cause forward and vacate a judgment on the ground of mistake. Heard September Term, 1882, VEAZEY, J., presiding. Petition dismissed. The action against said Owen was debt upon a recognizance in a suit in favor of the State against one Stewart, it being a criminal process signed by a justice of the peace. Said Stewart was fined for selling intoxicating liquor; and the record of the magistrate showed that Owen duly recognized to the amount of \$100 for his appearance, on appeal, to the County Court. In the suit against Owen judgment was rendered by default against him for \$56.63. He intended to make a defence; and it was by mistake that he did not. The petitioner claimed that he never entered into the recognizance; "that if there is any such record it is wholly fraudulent and void"; and wished to have the judgment vacated that he might make this defence, and no other.

Redington and *Butler*, for the petitioner.

The record was fraudulent. Fraud is a proper defence. *State Treas. v. Cook*, 6 Vt. 282; *Park v. Sumner*, 23 Vt. 538; *Mott v. Hazen*, 27 Vt. 204; 53 Vt. 568; *Story Eq. s.* 160; 40 N. H. 348; 2 Mass. 481; 15 East, 617; 21 Vt. 409; 43 Vt. 91; 9 Vt. 348; 15 Vt. 505.

John Howe, for the State.

The record of the justice is conclusive. *Beach v. Rich*, 13 Vt. 595; 12 Vt. 538, 657; *Middlebury v. Ames*, 7 Vt. 166.

Collins v. Edson.

The opinion of the court was delivered by

TAFT, J. The only question made in this case is whether Owen is at liberty to show that he did not enter into the recognizance before the justice. The record shows that he did ; can he contradict it? That he cannot, has been too long and uniformly holden to require either discussion or authority.

Judgment dismissing the petition affirmed.

J. P. COLLINS v. H. O. EDSON AND OTHERS.

Recognizance. Presumption.

A minute of a recognizance on a petition praying that a judgment rendered by default through mistake be set aside and for new trial, "conditioned as provided by law," is not defective; but if so, the petition should be retained, and new security ordered.

PETITION alleging that at the March Term, 1882, of Rutland County Court, a judgment was rendered by default against the petitioner in favor of the petitionees through fraud, accident or mistake, and that the petitioner was deprived of a hearing; and praying that the judgment be set aside and for a new trial. Heard, September Term, 1882, VEAZEY, J., presiding. The recognizance minuted on the petition was as follows: "John Brislín recognized to the petitionees in the sum of seventy dollars, conditioned as provided by law."

The defendants filed a motion to dismiss the petition on the ground that the recognizance was not such as was required by the statute. The court overruled the motion.

Redington & Butler, for the petitionees, cited R. L., s. 1481; 9 Vt. 343; 15 Vt. 500; 17 Vt. 118, 562; *Perry v. Ward*, 20 Vt. 92.

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W. C. Dunton and *Edward Dana*, for the petitioner, cited *McGregor v Balch*, 17 Vt. 562; *Way v. Swift*, 12 Vt. 390; 23 Vt. 90; 10 Vt. 520.

The opinion of the court was delivered by

Taft, J. The defendants moved to dismiss the petition on the ground that the minute of the recognizance was defective in stating that it was "conditioned as provided by law." The presumption is that the recognizance was properly taken, and that the record when made will state its terms in full. We think the statute was fully complied with. See *Ross v. Shurtleff et al.* 55 Vt. If defective, the petition should not have been dismissed, but retained and new security ordered. *Houghton v. Slack*, 10 Vt. 520.

Judgment affirmed.

F. J. W. NOYES v. JOHN FITZGERALD.

Evidence.

The contention being as to what wages a carpenter was to receive per day; held, that evidence of what other carpenters received in other towns in another State, was too remote.

ASSUMPSIT. Plea general issue with notice of payment. Trial by jury, and verdict for plaintiff.

The plaintiff claimed to recover a balance alleged to be due him from the defendant on account of sixteen days' work done by the plaintiff for the defendant in the building of a house for the defendant at North Walpole, New Hampshire, which is just across the Connecticut River from Bellows Falls in Vermont, under an alleged contract that the defendant would pay the plaintiff carpenters' wages therefor. The plaintiff also claimed to recover upon the *quantum meruit*, if a special contract was not made out; and introduced evidence tending to show his competency as a carpenter.

The defendant claimed and introduced evidence tending to show

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that such was not the contract, but that the stipulated price per day was \$1.20, and that he had paid the plaintiff in full according to said stipulated price, and also all that his work was worth.

The plaintiff's specification was for \$2.25 per day. And he testified that carpenters' wages at said Walpole, at the time he did said work, were from \$2.25 to \$2.75 per day; and further, under the objection and exception of the defendant, introduced evidence to show what carpenters' wages were at that time in various towns in Vermont; namely, Rutland, Bennington, Manchester, Pittsford and Brandon.

This evidence tended to show that the wages paid in said towns in Vermont were from \$2, to \$2.50 per day.

G. E. Lawrence, for plaintiff.

James C. Barrett, for defendant.

The opinion of the court was delivered by

ROWELL, J. This evidence was too remote. It stands on no stronger ground than the rule that distant markets cannot be consulted in proof of values unless the markets are in some way inter-dependent or sympathetic. 2 Whart. Ev. s. 1290; *Rice v. Manly*, 66 N. Y. 82. No more liberal rule should be adopted here. Prices in the same vicinity may be shown. *Vilas v. Downer*, 21 Vt. 419, followed in *Stanton v. Embrey*, 93 U. S. 557. In *Benham v. Dunbar*, 103 Mass. 369, it is said that if the value of a town lot was in question, evidence as to the value of other lots should be confined to sales of comparatively recent date and of lots in the near vicinity.

Reversed and remanded.

JOHN B. PAGE v. BAXTER NATIONAL BANK.

B. having a contract with the government to furnish headstones for soldiers' graves and, being indebted to both the plaintiff and defendant, ordered all checks due for his work to be made payable to the defendant, and directed the defendant to first pay a \$1000 note which it held against him, and then to pay the plaintiff. The check came payable to B. He carried it to the bank, and by his agreement it was applied on what he owed the bank and C. *Held*, that the plaintiff could not recover; as the defendant never had control of the check, or its proceeds.

ASSUMPSIT. Plea, general issue. Trial by court, September Term, 1882, VEAZEY, J., presiding. Judgment for the defendant. It appeared that, on July 23d, 1880, one S. G. Bridges had a contract with the U. S. government for furnishing and erecting marble headstones for soldiers' graves, and that he was borrowing money to use in executing his contract. About May 31st of that year, his note for \$1000, endorsed by J. W. Cramton, J. N. Baxter and G. E. Royce, three of the directors of the defendant bank, was discounted by said bank, and held by it until paid, as hereafter stated.

Among other securities given by him to the endorsers, were certain government vouchers, signed in blank, accompanied by a letter as follows :

" May 31, 1880. Col. A. F. Rockwell, A. Q. M., U. S. A., Washington, D. C. Sir: Please forward amounts as they may be due us, for the execution of my contract for headstones, to the Baxter National Bank, Rutland, Vt. Enclosed please find two sets signed vouchers. Respectfully yours, Sam. G. Bridges."

The vouchers and letters were kept by Baxter, in his desk, in the bank, of which he was vice-president, upon the understanding with Bridges, that they were not to be forwarded to Col. Rockwell until the work upon certain cemeteries was completed and the pay due.

Cramton also held Bridges' note for \$550, which was unsecured, and the existence of which was not known to the plaintiff, or to Baxter.

On or about said 23d of July, Bridges obtained from the plaintiff an advance of \$250 ; and the plaintiff also endorsed Bridges' note for \$1200, payable at the Rutland County National Bank, which was discounted by the latter bank, and has been since paid by plaintiff as such endorser. The indebtedness of \$1450 remains unpaid by Bridges.

By way of security for the \$1000 note and the \$1450 liability, Bridges on July 23d signed the following letter, which was at once mailed to Col. Rockwell, viz :

" July 23, 1880. Col. A. F. Rockwell, A. Q. M., U. S. A., Washington, D. C. Sir: Transacting business at the Baxter National Bank of Rutland, Vt., hereby request that checks be sent payable to the above bank when due me for the completion of headstone work. Respectfully yours, Sam. G. Bridges."

And he also signed the following notice, addressed to the defendant, to wit :

" Rutland, Vt., 23d July, 1880. Baxter National Bank : Having made all moneys to become due me upon my government contract payable to you, you will please, out of the first proceeds thereof, pay my note for \$1,000, which is payable at your bank ; and next, certain notes or indebtednesses to the amount of \$1,450 for which I am responsible to John B. Page, being an advance of \$250, and a note for \$1,200, endorsed by him, and payable at the Rutland County National Bank. Sam. G. Bridges."

Which order was on the same day at the bank delivered to Baxter, for the bank ; and he understood that it was delivered to him for the bank. Baxter was at the same time informed that said last letter had been mailed to Col. Rockwell. He put the order in his private desk with the other papers, supposing that he was to receive information when work was completed for which pay would become due, and did not inform the cashier of the existence of the order. He held vouchers signed by Bridges in blank, and supposed they would have to be filled out and sent to the government, and that when a draft should come payable to the bank, the cashier would inquire as to what disposition should be made of the proceeds.

Afterwards, on November 5, 1880, Bridges called for the order and signed the following, then written by Baxter at Bridges' request, at the foot thereof :

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“ Rutland, Vt., 5th Nov. 1880. To Baxter National Bank : The above note, of \$1,450, having been extended, I hereby request that the first moneys coming to you hereby, by virtue of said government contract, be appropriated to the payment of said \$1,000 note and the expenses of completion of Spring Grove and Green Lawn Cemeteries, located at Cincinnati and Columbus, Ohio, respectively. Sam. G. Bridges.”

And the order was again replaced by Baxter in his desk. The \$1,450 debt had not been extended ; and the plaintiff had no knowledge of the attempted modification of the order, and never consented thereto.

Afterwards, on November 16, 1880, Bridges received a U. S. treasury draft or check, payable to his own order, for \$1,590,28, due him under said contract. He took the same to Cramton, and wanted to pay his note due him out of the draft, and to keep the balance, and have further time on the note of \$1,000, due at the Baxter Bank. Cramton declined to extend the time, and insisted that the bank note, then overdue, should also be paid. Bridges acceded, and they both went into the bank and delivered the same, endorsed in blank by Bridges, to the cashier, who, by direction of Bridges and Cramton, gave Bridges credit for the amount thereof on his private account, on the books of the bank, and charged said account with the sum of \$1,008,10, the amount due on the \$1,000 note, and with \$550, which was at the same time credited to Cramton, whereby said \$1,000 note and said \$550 note were paid ; the remainder of the proceeds of the draft, being \$32.18, was applied on an existing overdraft in Bridges' account, leaving a balance of \$42.37 still due on the overdraft for which he afterwards gave the bank security. Neither the cashier nor Cramton knew of the order which Baxter held as aforesaid ; nor of Bridges' obligation to Page. Nor did Baxter know at the time that Bridges had received the draft, nor of his disposition of it. The plaintiff afterwards called on defendant for a statement of the amount, if any, received by it on Bridges' contract, and was informed of the draft and the way the proceeds had been appropriated, and claimed the balance of the proceeds after payment of the \$1,000 note, being \$582.10, which the bank refused to pay him.

All parties acted in good faith, except Bridges.

F. G. Swinington and Prout & Walker, for the plaintiff.

W. C. Dunton and Edward Dana for the defendant.

The opinion of the court was delivered by

Taft, J. Bridges ordered the government to make all checks due him for head-stone work, payable to the defendant, and directed it to pay the plaintiff out of the moneys received on such checks. The check in question was not made payable to the defendant, and no money ever came into its hands by virtue of the order. We cannot hold that the transactions at the bank, when the check was paid, constituted a reception by it of the funds in question, for the purposes contemplated by the parties when the order was given. The check was payable to Bridges, and nothing in the case shows that the defendant could by any means have obtained control of it, or of its proceeds; it was in no fault in respect to it, and the contingency upon which it was to pay the plaintiff, never happened. Upon this ground the defendant is entitled to judgment without regard to the other questions, in the case, which are not passed upon.

There was no error in the judgment below, which is affirmed.

Hawkins v. Hyde.

C. M. HAWKINS v. MARY E. HYDE.

Contract.

The plaintiff and defendant were partners in the hotel business. She, and her two daughters, who were more than twenty-one years old and members of her family but not dependent upon her for support, lived in a cottage near by and took their meals at the hotel; also her son boarded there for a few weeks. The auditors having found that there was no express promise to pay, and reported no facts that raise an implied promise, it was held that she was not chargeable with their board.

ACCOUNT. Heard on the report of auditors, September Term, 1882, VEAZEY, J., presiding. Judgment *pro forma* for the plaintiff to recover \$232.43. The defendant was the owner of a hotel. She sold to the plaintiff an undivided half of the hotel fixtures, furniture and livery property. The auditors found:

"They however, in May, 1880, by a mutual understanding, opened said hotel, under no definite arrangement but as tenants in common. They went to work, each understanding that the expenses, profits and losses were to be proportionately borne and shared between them; in fact their arrangement was a partnership arrangement; the defendant was the sole owner of the real property and she was to be allowed three hundred dollars per year for that. Under this arrangement the business of the hotel and livery was managed mainly by the plaintiff and R. W. Hyde, a son of the defendant; the plaintiff having charge of the dining room, kitchen, livery and other outside business, and R. W. Hyde had charge of the books, money and office—both however, had access to the money and books, and assisted when required in each other's department."

"The business thus begun under the style of Hyde & Hawkins, was continued by them till October 21, 1880, when the plaintiff bought of the defendant her undivided half of said personal property, and the defendant retired, and the partnership was dissolved."

Item 2. This board and washing was for a daughter of the defendant, who was, at the time, considerably more than twenty-one years of age, but had always lived and made her home with the defendant and been treated as a member of the family. When

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Hyde & Hawkins opened the hotel in May, 1880, the defendant and her two daughters, Sophie and Alida, who was also at that time over twenty-one years of age, moved into a cottage house, owned by Mrs. R. W. Hyde, situated near the said hotel, in which the defendant and her daughters roomed that season and took their meals at the hotel table of Hyde & Hawkins. No charge was ever made upon the books for the board of these daughters, and the defendant never agreed to pay for their board. Several of the furnished rooms in this cottage were used for hotel guests, and the defendant had the general oversight of the cottage, and she and her said daughters assisted in entertaining guests of the hotel through the season, and assisted at times upon the table work at the hotel.

"No contract was ever made about the board of Sophie and Alida; and neither daughter was dependent upon the defendant for support, but both were members of the defendant's family; there was no agreement as to the rent of the cottage and services rendered by Sophie and Alida, and no evidence introduced as to the rental value of the cottage, nor as to the value of the services of Alida and Sophie except as above found."

Item 3. "This is for board for a son of the defendant, who was in business in the South and came to the hotel and remained the time charged for, and we find the charge reasonable. He went to the hotel and remained there because his mother, sisters and brother were there. Nothing was said about the pay for his board when there and no charge was made for it. The defendant did not agree to pay for his board, and it did not appear that she asked the firm to board him."

Item 6. This was for boarding Alida. The same facts were found in relation to her work and assistance, &c., as were found as to *item 2*.

Bromley & Clark, for plaintiff.

R. C. Abell, for defendant.

The opinion of the court was delivered by

ROWELL, J. There are no facts found that raise any implied promise on the part of the defendant to pay for the board of her daughters and son or any of them, and any express promise in this behalf is directly negatived by the report; therefore the de-

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fendant is not liable for any part of items two, three, and six.

Judgment reversed, and judgment on the report for plaintiff for \$130.16, and interest thereon from September 12, 1882.

STATE v. CLARK SMITH.

Evidence. Intoxicating Liquor.

When one is on trial for having illegally sold intoxicating liquor, it is in the discretion of the court, to allow offences specified to be proved by other witnesses than those named in the specifications.

INFORMATION charging the respondent with illegally selling intoxicating liquor. Plea, not guilty; trial by jury, March Term, 1882, VEAZEY, J., presiding. Verdict, guilty. The case is stated in the opinion.

John Howe, for the State.

G. M. Fuller and *R. C. Abell*, for the respondent.

The opinion of the court was delivered by

ROWELL, J. The government was allowed to prove, not offences other than those specified, but those specified by witness other than those named in the specifications. This was matter of discretion and not revisable.

The respondent takes nothing by his exceptions.

 Pember v. Congdon.

F. T. PEMBER v. C. H. CONGDON.

*Witness, One Party to the Contract Deceased. Ejectment.
Betterments.*

1. In an action of ejectment where both the plaintiff and defendant claim to have derived their interest in the premises in question from the same party, (now deceased), the one as heir, and the other by contract, the defendant, under our statute, is not a witness in his own behalf, to prove that such party agreed by parol to deed the premises to him on his paying \$150, and that he paid it; as this was the contract "in issue and on trial."
2. On motion of the defendant the cause was remanded if a declaration for betterments was filed under the statute.
3. R. L. s. 1002—witness act—construed.

EJECTMENT. Plea, general issue. Trial by court, September Term, 1882, VEAZEY, J., presiding. Judgment for the defendant.

The court found that L. D. Pember formerly owned the land in question; that in 1854 he deeded the same with other lands to Ruel Pember; that in 1879 the administratrix of said Ruel Pember's estate conveyed the lands in question to the plaintiff; that L. D. Pember remained in possession after his deed of 1854; that he sold and conveyed by deed to other parties several different portions of said lands; that said Ruel conveyed these lands so sold back to L. D. Pember, and also a part to a son of L. D. Pember. The court also found that L. D. Pember occupied said lands as the tenant of Ruel Pember, and paid rent; that said L. D. executed a mortgage to the defendant; and that the defendant foreclosed his mortgage, making L. D. Pember only a party thereto, and by virtue thereof took possession of the premises.

On trial the defendant was allowed to testify, against the objection of the plaintiff, that Ruel Pember, not long before his death agreed with him, defendant, that if he would pay one Baker \$156 for the said L. D. Pember, that he, the said Ruel, would make no claim to the premises as against said mortgage; and that he, defendant, paid said sum to said Baker. The court found that this testimony was true.

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W. C. Dunton and Edward Dana, for the plaintiff.

Defendant is not a witness under our statute. R. L. s. 1002 ; *Merrill v. Pinney*, 43 Vt. 605 ; *Davis v. Bank*, 48 Vt. 538 ; *Ins. Co. v. Wells*, 53 Vt. 14 ; *Hall v. Hamblett*, 51 Vt. 590 ; 38 Vt. 509.

Joel C. Baker, for the defendant.

The original parties to the contract or cause of action in issue and on trial were Ruel Pember and L. D. Pember. The fact, to which the defendant testifies, bears upon the cause of action on trial, but it comes in collaterally only, and does not bring the cause within the terms of R. L. s. 1002. *Lytle v. Bond*, 40 Vt. 618 ; *Cole v. Shurtliff*, 41 Vt. 311 ; *Morse v. Low*, 44 Vt. 561 ; *Chaffee v. Hooper*, 54 Vt. 513.

The opinion of the court was delivered by

TART, J. This is an action of ejectment. The plaintiff is entitled to a judgment unless the testimony of the defendant was properly admitted. He, the defendant, testified that he made a contract with Ruel Pember, from whom the plaintiff's title is derived, by the terms of which said Ruel was to make no claim to the demanded premises, as against the defendant's title, and claims that such contract created an estoppel. It is conceded by the defendant, that if this contract was the one "in issue and on trial," then he would be incompetent as a witness under s. 1002, R. L. He claimed that the contract afforded him a full defence ; and the case shows that it was a substantial issue on trial. "The words, *contract in issue*, as used in the statute, mean the same as contract in dispute or in question, and relate as well to the substantial issues made by the evidence as to the merely formal issues made by the pleadings." *Hollister v. Young*, 42 Vt. 403. It is unnecessary to decide whether the contract, if proved, would amount to an estoppel or not. The testimony of the defendant should have been excluded. Judgment reversed, and judgment for the plaintiff for the seizin and peaceable possession of the premises ; but on motion of defendant the cause is remanded if declaration for betterment is filed under the statute.

H. L. HITCHCOCK v. LYMAN TOWER.

Fence. Impounding. Replevin.

If contiguous land owners by *parol agreement* divide the fence between them, such agreement is binding so long as they act under it ; and, if one fails to make his part a legal fence, and the other's cattle escape over it into his field, he has no right to impound them.

REPLEVIN. Avowry that the cattle were taken *damage feasant* in the defendant's enclosure and duly impounded. Trial by court, March Term, 1882, VEAZEY, J., presiding. Judgment for the plaintiff. The facts appear in the opinion of the court.

W. C. Dunton and Edward Dana for plaintiff.

P. R. Kendall, for the defendant.

The opinion of the court was delivered by

TART, J. The parties own adjoining lands. At the time the controversy arose, no division of the fence between said lands had ever been made by the fence viewers or by agreement of the owners executed as provided by R. L. sec. 3190. The plaintiff's cattle escaped through the fence on to the defendant's land ; the defendant impounded them, and this action is brought to recover them. The plaintiff's right to recover depends upon whether the defendant was bound to keep the fence, through which the cattle escaped, in repair. One "cannot lawfully impound the cattle of others if they enter upon his land through his, the impounders', neglect in regard to his portion of the division fence." *Porter v. Aldrich*, 39 Vt. 326. The court below found that at the time of the escape, the defendant was maintaining that portion of the fence where the cattle escaped ; and that for a long time prior, it had been maintained by him and his predecessors in title and occupancy ; and it is evident from the exceptions that it had been, and then was, so maintained under a parol agreement as to a di-

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vision, made by prior owners long before, and which had been acquiesced in by the parties during their ownership of the lands. In this respect the facts are similar to those in *Tupper v. Clark*, 43 Vt. 200. In the latter case the court say that the "parties were each under obligation to the other to keep up one-half of the division fence according to the terms of the agreement found, certainly until one or the other repudiated it." We think there is good reason for saying that if contiguous land owners agree by parol upon a division of their line fences, and act under such agreement, that in respect to the defects in such fences they are bound to each other by the same obligations as though there had been a division in the modes contemplated by the statute, whether one may be supporting more than his equal proportion or not. In this case so long as the defendant maintained the fence under the parol agreement found by the court, he was liable for injuries resulting from defects in it. He therefore had no right to impound the plaintiff's cattle. This disposes of the case without referring to the question of prescription.

Judgment affirmed.

SCHOOL DISTRICT No. 9 IN CLARENDON, v. THOMAS BROWN.

School. Teacher. Certificate. Superintendent. Statute of Limitations. Voter.

- * The teacher obtained a certificate in one town, and taught in another town which had elected one a superintendent who was not a voter in town meeting. He, however, served in his office for a while, visited the teacher's school, and promised to "endorse" her certificate; but this he failed to do, having removed from the town, and soon afterwards died. Payment was made to the teacher in March, 1876; this suit was commenced in July, 1880, to recover under the statute of the committee what he had paid, on the ground that he paid to one who did not have a legal certificate. *Held,*

1. The action can not be sustained.
2. One is not eligible to the office of superintendent of school unless he is a voter in town meeting.

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3. There being no lawful superintendent in the town where the school was taught, the certificate was valid. R. L. s. 489.
4. The statute authorizing a recovery is penal ; and the Statute of Limitations is a bar.
5. R. L. ss. 523, 2644, voters in school meeting ; s. 1717—penalty, Statute of Limitations ; s. 489, office of superintendent vacant ; s. 495, committee liable if he pays teacher without certificate—construed.

CASE, under the statute to recover of the defendant what he had paid a teacher, who, it was claimed, had not obtained a legal certificate. Heard on the report of a referee, March Term, 1882, VEAZEY, J., presiding. Judgment for the defendant.

The committee paid the teacher with orders on the district, the last one dated March 3d, 1876. This action was commenced July, 1880. The other facts are stated in the opinion.

J. C. Baker, for the plaintiff.

No law requires one to be a voter to be eligible to the office of town superintendent. He was exercising the office *de facto*, and Miss Farrell knew he was so acting as superintendent at the time she engaged to teach this school.

A teacher cannot sit in judgment on the title of the town superintendent to his office. He was elected and acting, to her knowledge ; and his public official acts and character cannot be enquired into collaterally, by the public who have business with the office. *Johns v. People*, 25 Mich. 499 ; *Eaton v. Harris*, 42 Ala. 491 ; *Adams v. Jackson*, 2 Aik. 45 ; 36 Vt. 329, 396.

Prout & Walker, for defendant.

Sherman was ineligible to office, not being a voter. Gen. St. c. 15, ss. 1, 2, 13. The certificate was therefore valid. Gen. St. c. 22, s. 59 ; *Holman v. School Dist.* 34 Vt. 270.

Miss Farrell was perfectly protected by Sherman's agreement to endorse his approval upon the Rutland certificate. It was not necessary that he should personally examine her as to her qualifications. *George v. School Dist.* No. 8, 20 Vt. 495. Especially in view of the existing law providing a uniform set of questions for each county, and a fixed percentage as a standard for success. R. L. ss. 485-489. Nor was it essential that the certificate should be actually delivered to the teacher. The *decision* of the super-

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intendent is the efficacious act. *Blanchard v. School District*, No. 11, 29 Vt. 433. A teacher's certificate is effectual from the time it is given, although the school may have already commenced. *Paul v. School Dist.* 28 Vt. 575; *Scott v. School Dist.* 46 Vt. 452; 41 Vt. 353.

The statute allowing a recovery is penal. The Statute of Limitations is a bar. R. L. s. 1717; *Carter v. Howard*, 39 Vt. 108; 1 Tyler, 283.

The opinion of the court was delivered by

REDFIELD, J. This case savors of "mint and cummin," while "the weightier parts of the law" are not much invoked. Brown had been sole committee man for the district, and, as such, he hired Miss Farrell to teach the district school the two terms, in 1875, beginning the first Mondays of May and November, respectively. She obtained her certificate of qualification at a public examination of teachers in the town of Rutland, early in the season, not then being determined in her own mind whether she would teach school or not; but was subsequently hired by defendant Brown to teach the school in question. The town of Clarendon at the March meeting, A. D. 1875, elected one E. M. Sherman superintendent of schools for said town, who accepted the office.

On the 28th of May of that year, he visited Miss Farrell's school, and while there Miss Farrell made known to him that she held a certificate of qualification from the authorities of Rutland; and he told her that was satisfactory, and to have it with her the next time he visited the school, and he would then "endorse it." He never afterwards visited the school, but about the 13th of September removed from said town, and soon afterwards died.

I. It is urged that Sherman was not eligible to the office of superintendent of schools, in March, 1875. He had no grand list in that town at the time, and was not a legal voter in said town. At the annual meetings "towns shall choose from among the inhabitants thereof" the town officers. But the voters are those "whose lists have been taken in (such) town at the annual

assessment next preceding a town meeting"; and a meeting of *such voters* shall be held in each town. It is certainly reasonable, that as those only who have the legal right to vote have the right to attend and participate in town meetings, such are the persons from "among whom" officers shall be chosen.

II. It is claimed, also, that this action is *penal* in its character, and is barred by the Statute of Limitations. There is much force in this suggestion. The recovery is sought of Brown of a sum of money for non-compliance with the law; and is as much a *penalty* as if the statute declared that Brown should *forfeit* \$100 if he paid a teacher who had not obtained a *certificate*.

The provision of the statute is susceptible of the construction, doubtless, that Brown having paid the money to the teacher without warrant of law from the treasury of the district, should restore it to its rightful place; and in that view the law would be remedial, and should be liberally construed to advance the remedy. But we prefer to determine this case upon its more substantial merits. Were this an action in favor of the teacher to recover her wages, we think the defence, that she had not complied with the law in regard to a *certificate*, would not avail.

She had, in proper season, obtained a certificate at a public examination of teachers in Rutland, the principal and capital town of the county, which gave the better guarantee of qualification and fitness. She had made that known to the superintendent of Clarendon; and he had assured her he would "endorse it" at his next visit to the school. He was ready to do it *then*, but, by accident, it was not then at hand. She relied upon the promise and assurance. The superintendent removed from town; was taken sick and died. At the time she commenced the winter term there was no superintendent of schools in Clarendon, and she could rightfully rely upon her Rutland certificate. The promise to "endorse the certificate" was to give it character and effect from its date. The fact that the "endorsement" was not actually written upon the certificate was rather a casualty than the fault of any one.

She might rely upon his promise and reasonably expect that he would revisit the school, and afford the opportunity to do what he

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had promised, but a providential incident intervened and prevented, which was in no sense her fault. We think she would not be barred by the statute the recovery for meritorious services as teacher in the public schools. And for a stronger reason the committee could not be punished for paying her what was legally her due.

This is, we think, entirely in accord with the reasoning of REDFIELD, Ch. J., in *Blanchard v. School District*, 29 Vt. 433; also, *George v. School District*, 20 Vt. 495; and gives force and effect to the statute for all useful ends.

It is not unfrequent or unnatural in the mutations of these petty officers, when Smith must be made to tread carefully in official duties, and Brown must be made to *smart* for not having "gone according to law," that stringent statutes, wisely made to "spur up" men in the discharge of a public trust, are twisted to subserve mischievous ends.

The judgment of the County Court is affirmed.

M. H. DICKERMAN v. ABEL RAY.

Contract to sell land. Trover. Standing Timber. Conditional Sales.

By written contract P. agreed to sell a piece of land to H., and convey when the purchase money was paid. The standing timber was to remain P.'s as security. H., without paying, cut and sold a part of the timber to J., and P. gave notice of his ownership; thereupon, J. bought P.'s interest in the land and timber, prior to any attachment. Before J.'s deed was recorded, the lumber, not having been delivered, was attached by the creditors of H. *Held*,

1. That J. was the owner of the land, and by legal sequence the lumber; and that he could follow it and assert his dominion over it.
2. The statute in regard to conditional sales has no application to the case. It is not material that the deed should have been ever recorded.

Dickerman v. Ray.

TROVER for five hundred saw logs. Plea, general issue. Trial by court, March Term, 1882, VEAZEY, J., presiding.

Judgment for the defendant. The action is founded upon a receipt given by the defendant to the plaintiff for said logs as property attached by the plaintiff as sheriff upon a writ in favor of one Puffer against one B. J. Hall. The logs were drawn to and used by Johnson and Parmenter after the attachment, and thereby the defendant was unable to deliver them up on demand. The question was whether the logs were attachable by said Hall's creditors. The condition in the writing was :

The condition of this obligation is such that if the said Benj. J. Hall shall pay or cause to be paid one certain note bearing date October 2, 1879, signed by said Benj. J. Hall, and payable to Ethan Priest or bearer, fifty dollars of said note to be paid May 1, 1880, with interest, the balance to be paid May 1, 1881, with interest annually, according to the true intent and meaning of said note. The wood and lumber on said premises to remain the property of said Priest until said note is paid in full. And when said note is paid I am to give a good and valid deed of the following described premises, being the land deeded to me by John D. Buswell, containing thirty acres, more or less. Now if the said note is paid or offered to be paid I am to give said deed, but if said note is not paid or offered to be paid, then this obligation is to become void and of no effect.

The other facts are stated in the opinion.

J. C. Baker, for plaintiff.

So far as this contract contemplated a sale of the standing trees to be severed from the soil, it was a contract for the sale of personal property, and the logs when cut and piled became the property of Hall, subject to the legal effect of the condition in the bond. *Clafin v. Carpenter*, 4 Met. 580 ; *Nedleton v. Sikes*, 8 Met. 34 ; *Nelson v. Nelson*, 6 Gray, 385 ; *Douglass v. Shumway*, 13 Gray, 498 ; *Yale v. Seeley*, 15 Vt. 221.

Priest then must rely upon the condition of his sale for all the security he has upon the logs. This bond, which is the only writing referring to them, was not sealed or recorded, and was not signed by Hall. A lien reserved on personal property by

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statute must be evidenced by a memorandum signed by the purchaser and recorded.

Walker & Goddard, for defendant.

The contract was valid. It was not a conditional sale of personal property. *Paris v. Vail*, 18 Vt. 277; *Smith v. Atkins*, 18 Vt. 461; *Briggs v. Oaks*, 26 Vt. 138; *Gray v. Stevens*, 28 Vt. 1; *Edson v. Colburn*, 28 Vt. 631; *Bellows v. West*, 36 Vt. 599; *Cooper v. Cole*, 38 Vt. 191.

The opinion of the court was delivered by

REDFIELD, J. By the written contract between Priest and Hall, Priest agreed to sell and convey to Hall the land in question, when Hall should pay the purchase money, as stipulated in Hall's note to Priest. The contract expressly provides that the standing timber should remain the property of Priest until the stipulated price should be paid. Hall never paid for the land. Hall cut and sold some of the standing timber, and negotiated a sale of some part to Johnson and Parmenter; but Priest gave notice to the said purchasers that he was the owner of said lumber. In this condition of things, Johnson and Parmenter bought Priest's right and interest in the land, and lumber cut therefrom by Hall, on the 17th of December, 1879, but their deed of the land was not recorded until the 17th of January, 1880; on the latter day, and before the deed was recorded, the lumber was attached as the property of Hall.

I. The standing timber was part of the realty, and was the property of Priest, and when severed from the freehold and become a chattel it remained the property of Priest. It was once made a question whether the reservation in a lease of the annual crops until the accruing rents had been paid, while the lessee remained in possession, as the ostensible owner, could avail, as against an attachment by the creditor of the lessee. But our courts, at an early day, sanctioned such contracts, as in the interest of poor tenants, and would not allow the crops to be snatched the moment the sickle had severed the corn, or the potatoe had

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become loosened from its bed, and the owner of the soil left unrequited. And it has been uniformly held by this court, that such contracts, if *bona fide*, should be upheld and made available, according to the true intent of the parties. *Paris v. Vail*, 18 Vt. 277; *Smith v. Atkins*, 18 Vt. 461; *Briggs v. Oaks*, 26 Vt. 138; *Edson v. Colburn*, 28 Vt. 631; *Bellows v. Wells*, 36 Vt. 599; *Cooper v. Cole*, 38 Vt. 191.

But this case seems unmixed with any doubtful ingredient. Priest was the owner of the land, and, by legal sequence, the owner of the lumber, when severed from the realty, and like every owner, whatever form the property as a chattel might assume, he could follow it and assert his title and dominion over it.

II. The statute in regard to liens and conditional sales of chattels has no application to this case. It is enough to say that as a chattel Hall never owned it; the title was in Priest absolutely. Johnson and Parmenter, on the 17th of December, 1879, by purchase from Priest, became the owners of this lumber long before the attachment. And it is not material, in this case, that their deed of the land should have been ever recorded, for they purchased the property as a chattel and became invested, as we have seen, with the full legal title.

Judgment affirmed.

Kemp v. Phillips.

B. F. KEMP v. M. L. PHILLIPS.

Agistment. Negligence. Burden of Proof on Owner of Cattle. Referees.

1. Whether an agister of cattle is negligent or acts in a wrongful manner, is purely a question of fact to be found by the jury or referee.
2. The burden of proof is on the owner of cattle to show wrong and injury done by the agister. *The court will not infer it*, although the agister hampered the colt with a poke, and the colt was afterwards found with a broken leg.
3. The practice by referees of delineating circumstances, and *finding no facts*, is censured.

CASE for negligence in agisting a colt. Heard on the report of a referee, March Term, 1882, VEAZEY, J., presiding. Judgment for the defendant. The declaration alleged, in part :

"And the defendant then and there received said colt from the plaintiff, and agreed with the plaintiff to pasture said colt at the aforesaid rate of thirty cents a week, and then and there promised to and agreed with the plaintiff to notify the plaintiff if and in case said colt was unruly, troublesome, or did not lie quietly in defendant's pasture. And the defendant avers that said colt did not lie quietly in defendant's pasture, but escaped therefrom frequently, and strayed away many times, and that defendant having full knowledge thereof, wholly neglected and omitted to notify the plaintiff as he had agreed and promised to do. * * * And plaintiff avers that defendant treated said colt in a careless, hazardous and improper manner, by fastening upon said colt a heavy and cumbersome poke, and that on account of such neglect and omission to notify plaintiff, and such careless, hazardous and improper treatment, said colt on or about * * * while in the defendant's possession, as aforesaid, received injuries which caused its death."

The referee found, in part :

"It was also agreed that if the colt was not 'orderly' in the pasture, or was in any way troublesome to defendant, the latter might notify the plaintiff, who was thereupon to take him away. * * * The pasture was a mountain pasture on Phillips' farm. In some parts it was quite rough. Its general character was known to the plaintiff as well as to the defendant. In the early part of the season some of the line fences were badly out of repair ; this was principally remedied during the season, and does not appear to have been known to Kemp.

"The colt was turned out June third ; there were three other colts in the pasture, one of which was taken out in August. The plaintiff visited the pasture every two or three weeks during the summer, and saw the

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defendant from time to time at defendant's house and elsewhere. He was occasionally told by defendant that the colt was doing well, and that he was 'no trouble,' and had no knowledge to the contrary.

"The colts were in the habit of running through the broken fences, and continued occasionally to get out of the pasture into adjoining lots after the fences were repaired. They were several times driven back by neighbors and by defendant's hired men. Plaintiff knew of their being out of defendant's pasture on one or more occasions; but did not know that they were in the habit of getting out, or that his colt was considered disorderly or troublesome by the defendant, and it does not appear that he was so considered, until an occasion in the latter part of August when plaintiff's colt and another belonging to the defendant escaped from the pasture, got some two or three miles away and were impounded. The defendant then paid the charges and had them brought back to his yard. He did not notify Kemp of this or ask Kemp to take the colt away, but the next morning he had pokes put upon plaintiff's colt and his own, and again turned them into the pasture.

"The plaintiff did not know of the escape or the impounding of his colt, or that a poke was put on it, and did not visit the pasture between that time and the time when the colt was injured as hereinafter stated.

"The pokes were alike and were of ordinary construction, having a wooden bow over the neck of the animal, with a stale about three feet long swinging on a wooden pin passed through the lower ends of the bow and prevented from coming back against the body of the horse by a like pin about six inches above the first one. Only two witnesses were called in respect to the propriety of poking the colt. I find from their testimony, which was not contradicted, that the placing of such a poke upon such a colt in such a pasture is not considered dangerous, and that farmers are accustomed so to poke their own horses, but that they are not accustomed to put pokes upon or 'hamper' horses owned by other persons without the authorization of the owner.

"A few days after the poke was put on plaintiff's colt, it was found standing in the lot of one Hall a few rods from defendant's line fence, and also near the line fence between said Hall and one Butler. The latter was a stone wall, which was thrown down near where the colt was found so that it was a mere heap of stones. The fence between the pastures of Phillips and Hall was also about half way down at a point some four or five rods from where the colt was found. The pastures in that vicinity were not rough. There was no evidence how the colt got from the pasture of the defendant into that of Hall, or that it had been over the broken wall between Phillips and Butler. The bow of the poke was over the neck of the colt, and the stale and lower pin were on the ground a short distance away. A horse wearing shoes stood near by, and such a horse belonged in the pasture of said Butler.

"The right hind leg of plaintiff's colt, when it was found as aforesaid, was broken above the gambrel joint. * * * It was not proved that the injury was attributable to the wearing of the poke, or that it was not. It was not proved that the placing the poke upon the colt in any way tended to cause the injury, or that it did not so tend. The way in which the accident occurred is wholly a matter of conjecture, as to which there was no evidence either direct or circumstantial which would warrant a finding either way upon the question whether or not there was any connection between the wearing of the poke and the injury to the colt."

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J. C. Baker, for plaintiff.

The agister is not only responsible for reasonable diligence but for reasonable skill in his business; he must at his peril know what are reasonable precautions against loss or injury to the animals, and take such precautions; ignorance of what is his proper duty is not only no excuse for a failure to discharge it but is negligence, for which the law will punish by holding him responsible. *Story Bailm.*, ss. 442, 444; *Phelps v. Parish*, 39 Vt. 511. The contract of agistment imposes the duty upon the agister of restraining the animal. *Sargent v. Leach*, 47 Vt. 674; *Smith v. Cook*, 15 English, 194. It is a matter of common sense that such a poke as defendant put upon this colt would much increase the danger. *Maynard v. Buck*, 100 Mass. 40. The burden of proof is on the defendant to show that the injury was not caused by the poke. *Brown v. Waterman*, 10 Cush. 117; 11 Cush. 70; *Bois v. R. R. Co.*, 37 Conn. 272; *Logan v. Matthews*, 6 Pa. St. 417; *Newton v. Pope*, 1 Cow. 109; *McDaniels v. Robinson*, 26 Vt. 316; 2 Sedgw. Dama. 151, n. 6; 46 N. Y. 490.

Ormsbee & Briggs, for defendant.

Negligence is a question of fact to be found by the referee. *Vinton v. Schwab*, 32 Vt. 612; *Maner v. Servants*, 10 Reporter, 639. The agister is only bound to use ordinary diligence. *Story Bailm.* s. 443; *Edwards Bailm.* ss. 327, 329. The agister is not an insurer; he is responsible merely for ordinary negligence. *Story Bailm.* 443; *Story Con.* s. 450. The burden of proof is on the plaintiff to show negligence. *McKay v. Irvine*, 13 Reporter, 387, 421; *Del., Lack. & M. R. R. v. Napheys*, 8 Reporter, 630; *Story Bailm.* ss. 213, n. 454; *Edwards Bailm.* s. 172, 399; *Story Con.* s. 451; *Harris v. Packwood*, 3 Taunt. 264; *Littock v. Wells, Fargo & Co.*, 109 Mass. 542, 456; *Schmidt v. Blood*, 9 Wend. 269; *Harrington v. Snider*, 3 Barb. 380; *Maynard v. Buck*, 100 Mass. 40.

The opinion of the court was delivered by

REDFIELD, J. The plaintiff placed his colt in the defendant's pasture to be agisted for him. It was afterwards found in the ad-

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joining pasture of another owner with a broken leg, and lost to the plaintiff. The action is founded upon the wrongful acts of defendant in agisting the colt. There are no facts in the case but such as appear on the report of the referee. The report is a graceful narrative of the contract of agistment, and incidents in the history of the colt up to the time he was found with its leg broken; but is naked of all facts tending to show wrong on the part of the defendant. The plaintiff claims that the hampering the colt with a poke without the plaintiff's consent was wrongful. But if this be conceded, the case fails to show that plaintiff has suffered injury from that cause. And it would seem an unnatural and strained inference for a court to infer that the broken leg was caused by the poke. If an inference is to be drawn from the circumstances detailed, it is altogether a matter of fact to be found by the jury or referee, and, in no sense, a matter of law with which the court have to deal.

It is claimed by the plaintiff that the hampering the beast with a poke, without authority from the plaintiff, was so far wrongful that the burden is cast upon the defendant to *negate* any injury from that cause; but we think, under all the proof in the case, it is incumbent on the plaintiff to prove his case by a fair balance of the testimony. If the beast is proved to have suffered for the want of food, or water, or salt, it shows or tends to show negligence and fault of the agister; but if the injury complained of in the declaration be a broken leg, and there is no legal or logical connection between the fault proved and the injury averred, and for which damages are sought, the grievance complained of is not sustained, and hence the plaintiff, by his proof, has established no basis for a judgment to requite the injuries he has alleged. There is great mistake, and not an uncommon error, in the report of referees, that they often carefully delineate circumstances and find no *facts*, with the seeming purpose of showing to the parties that they are entirely impartial by casting upon the court the burden of all ugly inferences of *fact*. Whatever be the motive the practice is a bad one.

The result is, that the judgment of the County Court is affirmed.

Rogers v. Rogers.

H. B. ROGERS AND WIFE, v. ELIZA ROGERS, ADMR. OF
CALISTA HOLTON.*Gift. Note. Consideration. Trust.*

The intestate, a short time before her death, gave a promissory note to the female plaintiff, who was a daughter of the intestate's husband by a former marriage. The daughter worked for her father for some time after her majority ; but no contract was proved that she was to receive pay for her services. The father, by a third person, conveyed his homestead of small value to the intestate. It is stated by the referee as a fact, that they designed, and often talked between themselves, that the said plaintiff should be paid for her services ; that the father so expressed his wish when he conveyed the homestead ; and it was to carry out this purpose that the note was given. *Held*, that there was no declaration of a trust ; no legal consideration for the note ; and as a gift, it rested in promise, not executed.

ACTION to recover the amount of a promissory note, and for work. Heard on the report of a referee, March Term, 1882, VEAZEY, J., presiding. Judgment for the plaintiffs to recover the larger sum named in the report including the note in contention. The referee found, in part :

“ At and prior to the time of this conveyance by the said Ebenezer to said Calista, it was the declared purpose of both the said Ebenezer and Calista not to require the principal of said note to be paid, and this for the expressed reason that both recognized a subsisting and unsatisfied obligation to the said Eliza for that or a larger amount in connection with, and in consideration of, her aforesaid services for her father after her majority ; this purpose and the said reason therefor was frequently made known or expressed by the said Ebenezer and Calista, with the additional declaration and expression, that if they were compelled to call for the \$200, it should in some way be made good to Eliza. When the said Ebenezer Holton so conveyed said land to his said wife, it was his expressed wish and expectation, that if the said Rogers was required to pay said \$200, and the said Calista should survive her said husband, she should see to it that Eliza should have \$200 out of the property, and it was so understood by the said Calista. There was no instrument of conveyance of said personal property from the said Ebenezer to his said wife. Said property was used and enjoyed by both, the same as prior to said conveyance, up to

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the death of the said Ebenezer. After his death it was treated as the property of said Calista. No administration was had upon his estate, and what remained of his personal property at the death of the said Calista was inventoried and administered upon as her estate and property. After the decease of the said Ebenezer, and prior to the 26th day of January, 1880, the said mortgage debt resting on said land and home place was required to be paid, and the said Calista was obliged to demand payment of said \$200 note, and the same was paid to her upon such demand, upon or prior to said 26th day of January, 1880. At and after the payment of said \$200 by the said Rogers, it was frequently declared by said Calista to be a matter of regret by her that her necessities required said payment, and as frequently declared to be her intent and purpose to pay to, or to provide for, the said Eliza out of the property to the amount of \$200. Matters continued in this way until April 23, 1880, when, in her last sickness, the said Calista made, executed and delivered to the said Eliza her promissory note for the sum of \$200, the same being in the following words and figures, viz.:

"DANBY, April 23, 1880.
 "For value received I promise to pay Mrs. Eliza Rogers, or bearer, two hundred dollars on demand, with interest annually.
 Signed, CALISTA HOLTON.

LUTHER COLVIN, } Witnesses.
 SARAH HAZELTON, }

Said promissory note was so made, executed and delivered by the said Calista Holton in consideration and under the circumstances aforesaid, and with and for the object and purpose on her part of, in that way, carrying out and accomplishing a long existing design and intention by both Mr. and Mrs. Holton, that Mrs. Rogers (the said Eliza) should in some way be further compensated or rewarded for her aforesaid service and labor out of the property, in that sum or amount. There was no other or further consideration for said note."

The other facts are stated in the opinion.

W. H. Smith, for the defendant.

There was no consideration for the note. *Hawley v. Farrar*, 1 Vt. 420; *Booth v. Fitzpatrick*, 36 Vt. 681; *Hayward v. Barker*, 52 Vt. 429.

J. C. Baker, for the plaintiff.

The words "value received" in the note imply a consideration and are *prima facie* sufficient. *Hughes v. Wheeler*, 8 Cowen, 77;

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Jennison v. Stafford, 1 Cush. 168 ; *Thrall v. Newell*, 19 Vt. 208.

Mrs. Holton accepted the conveyance of the property of her husband under the express understanding that she should not call for her two hundred dollars, but that it should go to Eliza to pay her the indebtedness of her husband.

The payment to Eliza of the two hundred dollars was a trust attached to the gift of the property, which in equity could be enforced, and that conveyance with said trust attached was a sufficient consideration for a promise to pay the two hundred dollars, which the party promising understood was to be paid out of the property to a meritorious creditor of the donor. *Smith v. Rogers*, 35 Vt. 140. The consideration was sufficient. *Hubbard v. Coolidge*, 1 Met. 84 ; *Train v. Gold*, 5 Pick. 380 ; *Oakley v. Booman*, 21 Wend. 588 ; *Clark v. Sigourney*, 17 Conn. 511 ; *Harrington v. Wells*, 12 Vt. 505 ; *Whittle v. Skinner*, 28 Vt. 531 ; *Giddings v. Giddings*, 51 Vt. 227.

The opinion of the court was delivered by

REDFIELD, J. The intestate, Calista Holton, during her last sickness and just before death, gave the note in question to the female plaintiff, who is the daughter by a former marriage of said Calista's husband, Ebenezer Holton. Mrs. Rogers before her marriage had lived with her father some time after her majority, a portion of which was after his marriage to said Calista. It does not appear that there was any contract or understanding that she should have pay for services in the family, or that her services were worth more than her "living." Said Calista, of her own money, loaned to Mrs. Rogers \$200. The note she ever kept in her possession up to the time of her husband's death, and since, until she collected it. The said Ebenezer, through a third person, conveyed his homestead to his wife, the said Calista. It was of about \$800 value burdened with a mortgage of \$500 ; and all his personal estate did not exceed \$100 in value. The said Calista after her husband's death, for the purpose of paying the mortgage on the homestead, called for the payment of the \$200 note of Rogers, and he paid it. It is stated as a fact, that Holton and his wife designed and often talked between themselves, either to for-

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bear collecting the \$200 of Rogers, or, in some way pay that sum to Mrs. Rogers ; and it was to carry out that purpose that Calista in her last sickness executed the note in question.

I. Did the promise rest upon sufficient consideration ? If it should be assumed (which does not appear) that Mrs. Rogers had a legal claim for services performed, the claim was against the husband and not the wife. It is suggested, in argument, that the conveyance of the homestead to Calista was in trust to pay this sum to Mrs. Rogers. But there was no *declaration* of such a *trust* ; and the property conveyed was of so small value that the whole would go to the wife on the decease of the husband ; and the court would not *assume* without proof that the wife took upon herself a trust, which would strip her of all means of support. It is unavailable as a gift, for it rested altogether in *promise* not *executed*. *Smith v. Kittridge* , 21 Vt. 238.

There are many things done very proper to be done, which become unavailing for the want of form or legal requisites. It was very proper that this woman at the close of life should essay to give her daughter-in-law \$200 ; it was proper in itself, and in accord with the often-expressed wish of herself and husband. But her method was legally unavailing. The note was given without any legal consideration—not for any moral or legal obligation or *duty* resting upon the party, and by well settled rules of law the note, as a contract, is without legal validity.

The judgment is reversed, and judgment on the report for the plaintiff for the lesser sum.

Mullen v. Rutland.

D. F. MULLEN v. TOWN OF RUTLAND.

Highway.

The defendant was repairing one of its bridges. The plank had been taken up; and at the close of a day's work its surveyor made a barricade to prevent traveling on the bridge; the plaintiff, ignorant of its condition, at night drove upon it and was injured. The question being whether the barricade was sufficient, the court charged the jury that if the surveyor "fully discharged the duty of the town, at the close of the day's work, by way of precaution against accident to travellers in the night time, the town is not responsible for this accident, nor liable in this case, although the barricade was rendered insufficient by accident, or malicious interference afterwards." *Held*, no error.

CASE for injury on a highway. Trial by jury, September Term, 1882, VEAZEY, J., presiding; and verdict for defendant. On trial it appeared that the defendant town by its highway surveyor was repairing under the direction of its selectmen one of its bridges; that the repairs were needed; that said repairs were begun a day or two before the accident in question, and a by-path or side road was provided for the passage of teams and travelers while the bridge was up, which was used and was suitable for use; that the hole left in the road by the taking up of the bridge was fifteen to twenty feet across, five feet in depth, and extended entirely across the wrought part of the road.

The plaintiff's evidence tended to show that on the afternoon of the day of the accident he, then living at West Rutland, took his wife and another lady in a single carriage and went to East Rutland to visit and attend a horse trot, not passing over the highway in question, but another one near by, and that he did not observe this bridge was up and being repaired and did not know of it; that about eight o'clock that evening they started to return home and drove with care and prudence; that the night was very dark and a little rainy or misty, and when they came to this bridge about nine o'clock they drove into this chasm, and the plaintiff's wife received the injuries complained of; that the barricade was very slight and entirely inadequate to prevent the horse from going into the hole.

The defendant's evidence tended to show that O'Neil, the highway surveyor who had charge of said repairs, at the close of the day's work of that day put up a barricade to prevent travellers from driving into said bridge, of great strength and hight, built of plank and timbers, and entirely adequate and sufficient to prevent a team knocking it down or getting over it, or driving into said hole, and that O'Neil left it in this condition about seven o'clock that evening, and knew no more about it until after the accident. None of defendant's witnesses testified as to the condition of the barrier after dark. It appeared that no lantern or watchman was left there to light or guard the place or warn travellers of the condition of the highway.

The plaintiff's evidence further tended to show that the barricade put across said road was slight and insufficient as put up and left by O'Neil at the close of the day's work, and was so during the evening, to the time of the accident, and at the time it was only about enough for a horse to stumble over—two or three planks only. And from this evidence it was claimed that if it was strong and sufficient when put up, it had been during the evening knocked down by accident or design, so that it was altogether insufficient when the accident occurred.

The court charged the jury :

" If O'Neil did all that a prudent man would have done, as I have explained, then the town is not liable for subsequent interference with the barrier of which its officers had no notice. If O'Neil fully discharged the duty of the town at the close of the day's work by way of precaution against accidents to travellers in the night time, the town is not responsible for this accident or liable in this case, although the barricade was rendered insufficient by accident or malicious interference afterwards. It would in such case be like a sudden and unforeseen defect occurring of which the town had no notice or was not charged with notice. In such case the statute liability does not arise. There is no claim of any notice of any subsequent interference in this case if any occurred."

Redington & Butler, for plaintiff.

During the progress of the repair the town was bound, at least, to use the care of a prudent man as well by night as by day, and it should be charged with notice of its insufficiency if caused by accident or malicious interference, if by using the care and diligence of a prudent man it might and would have known

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that it became insufficient. *Ozier et ux v. Hinesburgh*, 44 Vt. 220; *Campbell v. Fair Haven*, 54 Vt. 336; 2 Dil. Mu. Cor. 922; *Burnham v. City of Boston*, 10 Allen, 290; *Hubbard v. Concord*, 35 N. H. 22; *Worcester v. Canal Co.* 16 Pick. 54; *Hart v. Brooklyn*, 86 Barb. 226; 30 Conn. 118; 101 Mass. 99; 16 Gray, 508; 11 H. L. Cases 687-700. Where streets have been rendered unsafe by direct act, order or authority of corporations, no question has ever been made or can reasonably exist as to the liability of the corporation for injuries thus produced where the person suffering was without fault, or was using due care. 2 Dil. Mu. Cor. p. 919, s. 790; *Detroit v. Corey*, 9 Mich. 165-1861; *West v. Brockport*, 16 N. Y. 161; *Chicago v. Mayor*, 18 Ill. 394; *Conrad v. Ithaca*, 16 N. Y. 158; *Wenddell v. Troy*, 41 Barb; *Brock v. Summerville*, 106 Mass. 271; *McMahon v. Third Av. R. R. Co.* 75 N. Y. 271; *Howe v. Lowell*, 101 Mass. 99; *Hariman v. Boston*, 114 Mass. 241.

M. G. Everts and Prout & Walker, for defendant.

This charge was indisputably accurate and exact. If a municipality is removed in the night time by accident or design, and the authorities have no knowledge, no liability can under any circumstances attach. The town must be chargeable with some fault in respect to its duty to keep highways in sufficient repair. This duty the town was performing by rebuilding the bridge. An adequate by-way was provided. An efficient barrier was erected. The demolition of the same was wholly unknown to the town authorities. *Prindle v. Fletcher*, 39 Vt. 255; *Ozier v. Hinesburgh*, 44 Vt. 220; *Spear v. Lowell*, 47 Vt. 692; *Wharton Neg. ss.* 962, 963, 964; *Campbell v. Fair Haven*, 54 Vt. 336; 41 Vt. 449.

The opinion of the court was delivered by

REDFIELD, J. The plaintiff seeks to recover damages for injuries to the wife by reason of an insufficient highway.

The charge of the court was satisfactory except in one particular, to which the plaintiff excepted. The court charged the jury that "if O'Neil (the highway surveyor) fully discharged the duty of the town at the close of the day's work, by way of precaution

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against accident to travellers in the night time, the town is not responsible for this accident or liable in this case, although the barricade was rendered insufficient by accident or malicious interference afterwards."

The location and character of the highway, the frequency of travel, the necessity of lights to guard and guide the traveller, and of a strong, high and sufficient barrier or muniment, were carefully submitted to the jury by the court, without exception by the plaintiff. We think if the town performed its full duty and built a barricade at night-fall sufficient in height and strength, and in the right place, and had no knowledge or reason to suppose or suspect that some unforeseen casualty would happen to it, the town would not be liable. If by some accident or malicious interference the barricade had been broken down and a traveller thereby suffered injury, such incidents must have place with casualties and accidents.

We find no error in the charge of the court.

The judgment is affirmed.

HIRAM FRANCIS v. D. S. PARKS.

[IN CHANCERY.]

Misled. Carelessness.

If one is misinformed and misled and hence injured through his own carelessness, there is no ground for equitable relief; thus, the orator, having given a mortgage on certain lands to the defendant to secure his debt, failed to pay the same, and the defendant brought an action of ejectment, obtained a judgment, and the court allowed the orator time to redeem, ordering the last installment to be paid May 1st, 1881. Held, that a bill alleging that the orator was misled and misinformed as to the time when the installment became due without alleging, or proving, how or by whom he was misled, and praying that the defendant be ordered to accept the amount of the installment in satisfaction of his judgment, should be dismissed.

Francis v. Parks.

BILL in Chancery. Heard on bill, answer, traverse and master's report, March Term, 1882. VEAZEY, Chancellor, ordered the bill to be dismissed. The orator claimed in his bill, that, he, owning certain lands executed a mortgage of the same to the defendant; that on his failure to pay the defendant brought an action of ejectment, obtained a judgment, and the court under the statute allowed the orator time to redeem, ordering \$52.16 to be paid in one week from the date of judgment; \$100 by May 1st, 1880; and \$900 by April 1st, 1881, with interest; that he intended to redeem the land; that he paid the first and second installments in season; that he should have paid the last installment "had he not been misled and misinformed as to the date when it was provided when the same should be paid"; that he supposed the money was payable May 1st instead of April 1st, and prayed, that the defendant be ordered to accept the amount of the last installment in satisfaction of his judgment. The other facts appear in the opinion.

J. E. Manley and *G. E. Lawrence*, for orator, cited 2 Wash. Real Pr. 222; 2 Spence, 687; 53 Vt. 92; 53 Conn. 195; 41 Vt. 496; 1 Vt. 395; 3 Vt. 581.

Frisbie & Miller, for defendant.

The opinion of the court was delivered by

ROWELL, J. The only ground of relief alleged in the bill is, that the orator was misled and misinformed as to the time when the last installment became due under the judgment, but it is not alleged how nor by whom he was thus misled and misinformed. The answer denies the equity of the bill. The orator must stand on the case made by the bill, and cannot rely for relief on any matter not therein stated, though shown by the master's report. The master has not found that the orator was either misled or misinformed in the premises. He says that he may have understood in some way that the last installment was due on May 1st instead of April 1st, but if he did, it was the result of carelessness. Such a finding affords no ground for equitable relief.

Decree affirmed and cause remanded.

STATE v. INTOXICATING LIQUOR, AND CLARK SMITH,
CLAIMANT.

Intoxicating Liquor. Trial by Jury. Constitutional.

1. Intoxicating liquor, seized and condemned, according to law, is *outlawed*; is without rights, and a claimant of such liquor is not entitled to a trial by jury.
2. R. L. C. 169, ss. 3818, 3862, liquor law, construed.

COMPLAINT and warrant for the seizure of intoxicating liquor under sec. 3818, R. L. Clark Smith appeared before the justice and claimed the liquors. The justice adjudged the liquors forfeited. The claimant appealed to the County Court, and there demanded a trial by jury, which was denied. Heard, March Term, 1882, by the court, VEAZEY, J., presiding. The case is stated in the opinion.

R. C. Abell and Geo. M. Fuller, for claimant.

The claimant is entitled to have the issue made by him tried by jury. *Plimpton v. Somerset*, 33 Vt. 290; R. L. s. 3850; *Lincoln v. Smith*, 27 Vt. 328; Con. Vt.; *State v. Peterson*, 21 Vt. 513; *State v. Prescott*, 27 Vt. 194; *State v. Intoxicating Liquor, Drew, Claimant*, 38 Vt. 387; *State v. Intoxicating Liquors, Kelly, Claimant*, 44 Vt. 208.

Joel C. Baker, for the State.

The seizure and condemnation of intoxicating liquor, is a proceeding *in rem*, to fix the status of property considered dangerous to the peace and good order of society, and if the proceedings are regular, they bind the whole world. *Johnson v. Williams*, 48 Vt. 565. After a decision of forfeiture the prior owner has no longer any interest in the liquor. *Johnson v. Perkins*, 48 Vt. 572; the License Case, 5 How. 504; 94 U. S. 113; *Commonwealth v. Alger*, 7 Cush. 84; 9 Rep. 180.

The opinion of the court was delivered by

REDFIELD, J. The liquor was seized and condemned under the statute, as kept for sale contrary to the laws of the State. The defendant, as claimant, appeared before the justice, and averred that he is a druggist, had lawful use for the liquor, and it was not "kept for sale contrary to the law;" and being overruled and the liquor condemned, he appealed to the County Court, and there demanded a jury trial, which was denied him. Intoxicating liquor is *outlawed* by the statute, and made subject to seizure and confiscation. It has no rights that the law is bound to respect. It is a public enemy that, when discovered, the law smites.

This court decided in *Lincoln v. Smith*, 27 Vt. 328, that the statute for the forfeiture and destruction of this "public enemy" is constitutional and valid, as a proceeding *in rem*, for governing and regulating the "internal police" of the State.

It is a necessary power to preserve the public health and morals. *Commonwealth v. Alger*, 7 Cush. 84; *Smith v. Forehand*, 100 Mass. 136. No penalty can be imposed on the claimant, and no "issue joined proper for the cognizance of a jury." Nuisances are abated by the officers of the law without the intervention of a jury. Farms are cut up and house lots mutilated for the public benefit, under the order and decree of the court; rights in property to large amounts are extinguished and transferred to others in probate court, and a jury trial denied. And in this there is no infringement of the constitutional right of the citizen. The State has the right to destroy instruments, and base metals designed for use in debasing the currency of the country; or intoxicating liquors designed for destroying the health or debasing the morals of the people. *Preston v. Spalding*, 21 Vt. 9.

It is a proceeding *in rem* to fix the status of property considered dangerous to the people, and if the proceedings are regular they bind the whole world. *Johnson v. Williams*, 48 Vt. 565; *Johnson v. Perkins*, 48 Vt. 572.

The judgment of the County Court is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
AT THE
GENERAL TERM,
HELD AT
MONTPELIER, OCTOBER, 1882.

PRESENT :

HON. HOMER E. ROYCE, Chief Judge.

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| HON. TIMOTHY P. REDFIELD, HON. JONATHAN ROSS, HON. H. HENRY POWERS, HON. WHEELLOCK G. VEAZEY, HON. RUSSELL S. TAFT, HON. JOHN W. ROWELL, | } | ASSISTANT JUDGES. |
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M. R. DAVIS, ADM. v. CENTRAL VERMONT R. R. CO.

Master and Servant. Fellow Servants. Negligence.

1. A railroad company is liable in an action on behalf of its fireman killed by the washing out of a culvert, the culvert being in an improper condition resulting from the negligence and carelessness of its bridge-builder and road-master.
2. The negligence of the bridge-builder and road-master in caring for the culvert in law was the negligence of the defendant ; and notice to the former of a defective construction was notice to the latter ; hence, it is not a question of whether the servant whose negligence caused the injury and the servant injured were fellow-servants ; nor, whether the former was ordinarily skillful ; nor, whether the defendant was negligent in employing them.
3. The freshet which washed out the embankment was not so extraordinary as to excuse the defendant from liability.

Davis v. Railroad Co.

ACTION on the case for negligence. Plea, general issue. Trial by jury, September Term, 1881, Rutland County, VEAZEY, J., presiding. Verdict for the plaintiff to recover \$5000. As to the freshet which washed out the culvert, causing the accident, the court charged :

“The company did not warrant to Davis that the culvert or road-bed should be safe. It was not bound to know of defects and to keep the culvert safe at all events. But it was bound to use reasonable care to discover any defects in it and to put and keep it in a safe condition.

“To answer this degree of care the company was not bound to provide and maintain culverts that would withstand unprecedented floods or freshets not to be naturally anticipated. If this freshet was so extraordinary as to be beyond the reasonable anticipation of prudent men having the knowledge of this brook and locality as to liability to floods, as the case shows the men had who built and had charge of this culvert, then there is no liability on the part of the defendant on account of the disastrous effect of this freshet.

“The defendant claims that there was no defect in fact ; that reasonable care would not compel them to provide against such an extraordinary, sudden and violent freshet as this was ; that the culvert was ample in size and proper in construction for any such flow of water as ordinary care would anticipate ; that this freshet was so extraordinary and unprecedented as to be what is sometimes termed an act of God, against which human foresight could not and is not called upon to provide ; that the stockade of posts or piles was designed to protect the culvert and road, and would so operate in all cases which the company was bound to expect might happen, and would not in such cases stop the flow of water. If you find this as claimed the plaintiff is not entitled to recover.

“You will of course have in mind the general tenor of the testimony as to the general character and nature of this freshet. There has not been any particular dispute about this. It seems that the storm begun a day or two before, and that it was a snow storm, and that some inches of snow fell and then changed to rain and increased in violence the day of this accident ; that the ground was frozen and after the rain had saturated or been taken up by this snow it suddenly gave way and filled this small brook, and the extent of this flood has been alluded to by the witnesses—that is, its effects upon that vicinity. These things you will have in mind in determining whether this was such a flood as the defendant was reasonably bound to anticipate in providing a culvert at this

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time. You will also bear in mind the other facts as to the nature of this culvert; the liability to sudden rise of water in the streamlet there, and the formation of the surface, the hilly character of the region, as bearing upon the question whether this was a freshet the defendant was bound to anticipate."

The other facts are stated in the opinion of the court.

F. E. Woodbridge, G. C. Noble and J. C. Barrett, for defendant.

The jury have found that the accident was occasioned by the negligence of the section boss, the road master and bridge builder. And the case shows that these men were the *servants*, the employes of the company. The defendant, therefore, is not liable for the injury to plaintiff's intestate, who was a co-employee.

This entitles the defendant to a judgment. *Hard v. Vt. & Can. R. R.*, 32 Vt. 473; *Priestly v. Fowler*, 3 M. & W. 1; *Gallager v. Piper*, 33 L. J. C. P. 335; *Feltham v. England*, Law Rep. 2 Q. B. 33; *Mobile & Montgomery R. R. Co. v. Smith*, 59 Ala. 255; (An exhaustive case.) *McDonold v. Hazeltine*, 53 Cal. 35; *Faulkner v. Erie R'y Co.*, 49 Barb. 324; *Wonder v. Baltimore & Ohio R. R. Co.*, 32 Md. 412; *Ford v. Fitchburgh R. R. Co.*, 110 Mass. 240; *Holden v. Fitchburgh R. R. Co.*, 129 Mass. 268; *Lawler v. Androscooggin R. R. Co.*, 63 Me. 462, *Collier v. Steinhart*, 51 Cal. 116; *Albro v. Agawam Canal Co.*, 6 Cush. 75; *Smith v. The Mayor*, 66 N. Y. 295. If the company is in no fault as to the competency of servants, whether they in point of fact turn out to be competent or not, it is not liable for an injury to a servant that happens through negligence of a fellow servant. See authorities above cited.

Notice of defects to the other servants was not notice to the defendant. *Pierce Railroads*, 384; *McWilliam v. Saratoga & Wash. R. R. Co.*, 20 Barb. 449; *Blake v. R. R. Co.*, 70 Me. 60.

Prout & Walker, for plaintiff.

The company is under an obligation to its servants to use reasonable care to provide and maintain a safe road-bed, and suitable machinery, engines, cars, and other appointments of the railroad, and is liable to them for injuries resulting from defects which it

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knew or ought to have known, and could have prevented by the exercise of such care; and it is under the same duty and obligation to maintain these instrumentalities in proper condition. *Pierce Railroads*, 370-1; *Noyes v. Smith*, 28 Vt. 59; *Hard v. Vt. & Can. R. R.* 32 Vt. 478; *Camp. Negl. s. 73*; *Britton v. Great W. Cotton Co.* L. R. 7 Ex. 130; 85 L. T. (N. S.) 477.

Acts which the master as such is bound to perform for the safety and protection of his employes cannot be delegated so as to exonerate the former from liability to a servant. *Cone v. D., L. & W. R. R. Co.*, 81 N. Y. 206; *Fuller v. Jewett*, 80 N. Y. 46; *Kain v. Smith*, *Ib.* 458; *Hawley v. Nor. Cen. R. R.*, 82 N. Y. 370; *Painton v. Ib.*, 83 N. Y. 7; *Lansing v. N. Y. R. R. Co.*, 49 N. Y. 521; *Flike v. B. & A. R. R. Co.*, 53 N. Y. 549; *Ford v. Fitchburg R. R.*, 110 Mass. 240; *Snow v. Housatonic R. R.*, 8 Allen, 441; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Gilman v. Eastern R. R. Co.*, 18 Allen, 438; *Holden v. Fitchburgh R. R.*, 129 Mass. 268; *Ackerson v. Dennison*, 117 Mass. 407. *Hardy v. North Carolina Cen. R. R.*, 74 N. C. 734, 76 N. C. 5, holds that it is the duty of the corporation to inspect the whole road immediately after freshets and storms. *Cowles v. Richmond R. R.*, 12 C. L. J. 546 (N. C.); *Shanny v. Androscoggin Mills*, 66 Me. 420; *O'Donnell v. Allegheny Valley R. R. Co.*, 59 Pa. St. 239.

The opinion of the court was delivered by

Ross, J. The plaintiff's intestate, a locomotive fireman in the employment of the defendant was killed Dec. 10, 1878, while discharging his duties in such employment. This action is brought to recover damages sustained by the widow and next of kin from the death of the intestate. The declaration charges that, on the above named day, the defendant was operating the Rutland Railroad as lessee; that the intestate was in its service as locomotive fireman on its passenger trains passing over the railroad; that thereupon it became and was the duty of the defendant to keep and maintain a sufficient and safe road-bed and track, and to use due and proper skill and care in furnishing and maintaining a suitable and sufficient roadway for the passage of its passenger

trains; and that the defendant so negligently and carelessly performed its duty in this respect that the road-bed become washed away and the intestate thereby killed. This is the substance of the several counts in the declaration. The evidence showed that the accident occurred near Bartonsville on the Rutland railroad, and was caused by the washing out of a culvert. The plaintiff claimed and gave evidence from which the jury have found that the culvert was in an improper condition, resulting from the negligence and carelessness of the road-master, bridge-builder, and section boss. The culvert had been washed out two or three times before. The last time before that occasioning the accident was by the freshet of 1869. It was then rebuilt by the bridge-builder of the Rutland Railroad Company, or of the trustees who were operating it, and the embankment over it was constructed by the road-master of the same. The plaintiff claimed and gave evidence tending to show that, in constructing the culvert the bridge-builder carelessly and negligently obstructed it by constructing an improper stockade of piles on the up-stream side to prevent the drift wood and brush from being carried into the culvert by the brook that flowed through it, and that the road-master carelessly and negligently constructed the embankment above the culvert,—which was washed away on the occasion when the intestate received his injuries,—of loose and improper material. She also claimed and gave evidence tending to show that this defendant through its bridge-builder, and road-master, had carelessly and negligently allowed these defects to remain during all the years it had been operating the road, and also that its section boss had negligently and carelessly allowed the stockade to become partially filled and clogged so that it further obstructed the passage of water. The testimony further tended to show that the washout of the embankment above the culvert was occasioned by the stockade, holding back the water so that it rose and ran over the embankment and washed out the loose and improper materials of which it was constructed. It was not claimed by the plaintiff but that the defendant's bridge-builder, road-master and section-boss were ordinarily skillful and careful men in their several employments, nor that the defendant was guilty of any negligence in

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selecting and employing them. The plaintiff's evidence further tended to show that the defendant entrusted the construction and maintenance of all the bridges and culverts on that division to its bridge-builder; and that the construction and maintenance of the track and road-bed of that division was entrusted to its road-master, who had under him section-bosses, each of whom had a gang of section men and had under the road-master the care of about five miles of the track and road-bed. The plaintiff in the trial court contended that the negligence of its bridge-builder and road-master in caring for the culvert, and in failing to keep the same in proper repair both in regard to the improper construction and continuance of the stockade and the embankment above it, was in law the negligence of the defendant, and the County Court in substance so held and instructed the jury. The correctness of this holding and instruction is the principal question involved in the the decision of this case. The other contentions of the defendant that the declaration should have alleged that it had notice of the defects in the culvert and embankment, and that evidence of notice to its bridge-builder and road-master of these defects was improperly admitted, depend upon whether the bridge-builder and road-master so far stood in the place of the defendant in regard to its duty and negligence to the intestate, that their knowledge of the defects and their negligence in regard thereto were in law the knowledge and negligence of the defendant. The defendant contends that the bridge-builder, road-master and section-boss were fellow-servants of the intestate in running its trains and operating the road, and that their negligence and want of care are not, in law, imputable to it, that it is not liable for the consequences thereof to the intestate or his representatives; and that the consequences of such negligence were one of the risks which the intestate assumed when he entered upon the employment. It relies upon the decision of *Hard v. The Vermont & Canada R. R. Co.*, 32 Vt. 473. In the light of that decision it must be confessed that they were fellow-servants with the intestate in the general work of operating the road. Since that decision was promulgated the general subject of how far, and when, a master is liable to an employe for injuries resulting from the negligence of a co-employe

has been often before the courts of last resort in this country and in England, and has been much considered and discussed. The conclusions reached have not been uniformly the same. The general principles underlying the determination of the duties and liabilities of the master, and of the risks which the servant assumes by entering upon the employment are very generally agreed upon. Where the employment is hazardous it is very generally agreed that the master assumes the duty of exercising reasonable care and prudence, to provide the servant a reasonably safe place, and reasonably safe machinery and tools to exercise the employment, and to maintain the place, machinery and tools in a reasonably safe condition during the time of such employment. He also assumes the duty of exercising the same measure of care and prudence to provide suitable materials, suitable and sufficient co-servants to properly exercise the employment or carry on the business. Where this duty is discharged by the master, the servant assumes all risks and hazards attendant upon the exercise of the employment or performance of the work, including those resulting from the negligence and carelessness of co-servants. The diversity in the decisions has arisen in determining who are co-servants in the common employment, and whether the master is to be charged with the negligence of an employe who in some parts of the employment is strictly a co-servant with the person injured, and in other parts is discharging a duty incumbent upon the master. Some courts have held that the master is responsible for the negligence of a servant who had the right to command and did command an under servant, who was injured in the performance of such command or order negligently given. This distinction, however, is not now generally recognized; nor would it seem to be a proper application of the general principles which all agree apply to the relation of master and servant in regard to injuries sustained by the latter in performing the service. The principal diversity in the later decisions arises in determining the extent of the liability of the master for the negligence of his servant which causes injury to another servant, while performing a duty which by the relation of master and servant rests upon the master. The English courts generally hold, that, when the master has provided

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a reasonably safe place, machinery and materials in and with which the work is to be performed, but undertakes to keep the place and machinery in suitable repair through agents and servants, he has fully performed his duty when he has exercised reasonable care and prudence in selecting skillful and careful servants to detect defects and make repairs, and has supplied such servants with suitable help and materials with which to make such repairs; and that the master is not liable to another servant for any negligence of the first servant in detecting and making such repairs.

Wilson v. Merry et. al., 1 L. R. S. & D. Ap. C. 326. In this case the Lord Chancellor states the doctrine as follows: "I do not think the liability or non-liability of the master to his workman can depend upon the question whether the author of the accident is not, or is, in any technical sense, the fellow-workman or *collaborateur*, of the sufferer. In the majority of cases in which accidents have occurred, the negligence has, no doubt, been the negligence of a fellow-workman; but the care of the fellow-workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand upon higher and broader ground.

. . . The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servant, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does and a master who does not attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master, and if an accident occurs to a

workman to-day in consequence of the negligence of another workman, skillful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen." This view places the liability of the master upon the duty he owes the workman arising from their relations to each other. It implies that if the master personally attempts to discharge that part of the work which the relation devolves upon him, and his negligence therein causes injury to the workman, the master is liable therefor. The question is naturally suggested why should he not also be liable for the negligence of the agent or servant, whom he has appointed to discharge the same duty in his stead although he has exercised due care to select a person competent and skillful? Is such an agent or servant, while performing the duty *cast* by the relation upon the master, a fellow-workman with the master's servant in the employment, in such a sense that the latter cannot and ought not to recover of the master for injuries sustained through the negligence of the former? If so, the master who performs his part of the duty, as this defendant and all corporations must, by agents and servants, secures an immunity from liability which the master who personally enters the service to manage and direct the performance of the work does not enjoy.

The doctrine now established by the United States Supreme Court, and by most of the courts of last resort in the several States, holds the master liable to his workman for injuries sustained from the negligent performance of duties which rest, by the relation upon the master, whether the master perform such duties personally or through an agent or servant. Says Mr. Wharton in his work on Agency, s. 232: "It is important . . . to remember that the master is liable, *where the negligence of the offending servant was as to a duty assumed by the master as to working place and machinery*. A master, as we have already seen, is bound when employing a servant to provide for the servant a safe working place and machinery. It may be that the persons by whom buildings and machinery are constructed are servants of the common master, but this does not relieve him from his obligation to make

buildings and machinery adequate for working use. Were it otherwise, the duty before us, one of the most important of those owed by capital to labor, could be evaded by the capitalist employing his own servants in the constructions of his buildings and machinery. In point of fact this is the case with most great industrial agencies; but in no case has this been held to relieve the master from the duty of furnishing to his employe material, machinery and structures, adequately safe for their work. He does not guarantee that either building, machinery or organization should be perfect; but he is bound by the rule, *Sic utere tuo, ut alienum non laedas*, to use such diligence and care in this relation as is usual with good business men in his line. It is not enough for him to employ competent workmen to construct his apparatus. If an expert, he must inspect their work, and if not, he must employ another competent person as expert for the purpose. If such, however, is his duty, he must not only see that the structure he provides is suitable at the outset, but that it is kept in repair, and the repairer's negligence in this respect is the master's negligence."

Says Mr. Pierce in his work on Railroads, p. 370: "The company, like any master, is under an obligation to its servants to use reasonable care to provide and maintain a safe road-bed and suitable machinery, engines, cars, and other appointments of the railroad, and is liable to them for injuries resulting from defects which it knew, or ought to have known; and could have prevented by the exercise of such care; and it is under the same duty and liability to maintain these instrumentalities in proper condition. The servant assumes the natural risks of his employment, but not those which the wrongful act of the employer has added."

The same doctrine was held by the United States Supreme Court in *Hough v. Railway Co.*, 100 U. S. 213, in which Mr. Justice HARLAN reviews the authorities. In a note the reporter has cited a long list of cases sustaining the doctrine. *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268, also found in 2 Am. & Eng. R. R. Cases, 94, is a recent case on this subject, in which the then Ch. J. GRAY of Massachusetts, ably reviews the cases, and states the same doctrine. The editor of the latter report has in a note to this case collected a large number of American cases

in which the same doctrine has been announced. When the case of *Hard v. The Vt. & Canada R. R. Co.*, *supra*, was decided, the liability of the master was held to be dependent upon whether the servant whose negligence caused the injury and the servant injured were fellow-servants in a common employment or work. Making this the test for determining the master's liability, and the reasoning and conclusions of the late Chief Justice PIERPOINT are unanswerable. But this test, while determinative in a great number of cases, as we have seen, has been abandoned both in England and in this country, and in lieu thereof the master's liability has been made to rest upon whether the negligence arose in the performance of a duty for the careful discharge of which he became responsible when he assumed the relation of master to the injured servant. On the principles which we think furnish the true ground upon which the master's liability rests, and on the American application of them, the charge of the County Court in the particulars to which exceptions were taken contains no error. The American doctrine holding the master liable for the negligence of his servant while discharging a duty which the master owes to a general workman is more consonant with reason and the general safety of the travelling public than the English doctrine announced in *Wilson v. Merry*, *supra*. The bridge-builder and road-master while inspecting and caring for the defectively constructed culvert, were performing a duty which as between the intestate and defendant it was the duty of the defendant to perform. Their negligence therein was the negligence of the defendant. Being the agents of the defendant for the performance of these duties, notice to them in regard to the defective construction of the stockade as affecting the safety of the culvert, was notice thereof to the defendant. Hence, the evidence to show such notice to them was properly admitted. The declaration charged that the defendant was negligent in regard to the construction and repair of the culvert. This bound the plaintiff to prove such negligence. As against the motion in arrest in judgment, this was sufficient. It could not be negligent in these particulars unless it knew through those on whom it had cast the duty of inspecting and repairing the culvert, or ought to have known of the defects com-

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plained of. The charge of culpable negligence impliedly charged the defendant with knowledge of the defects.

Nor do we think that the evidence showed that the freshet which washed out the embankment was so extraordinary as to excuse the defendant from liability. It showed that the culvert was sufficient in capacity and construction, if it had not been for the improper construction of the stockade to have discharged all the water that flowed in the brook on that occasion. Under the evidence it was clearly the duty of the court to submit that question as it did to the determination of the jury. Hence, the defendant's request asking the court to hold that the defendant was not liable on this account was properly refused.

The judgment of the County Court is affirmed.

ORSON KIMBALL v. BOSTON, CONCORD & MONTREAL
RAILROAD COMPANY.

*Pleading. General Issue. Special Issue. Railroad. Free
Ticket.*

1. A plea setting up a different contract from the one declared on is bad as amounting to the general issue; thus, the plaintiff averred in his declaration that the defendant railroad received him into its cars to safely transport for *hire and reward*, and that by its negligence he was injured; the defendant pleaded in bar, in substance, that the plaintiff at the time of the accident was riding with a *free ticket, without charge*, and as consideration thereof assumed all risk of accident. *Held*, bad, as amounting to the general issue; as a special issue, it does not directly deny; as a traverse, it is an argumentative denial; and that the defendant having joined in demurrer, the question of defect in the plea may be decided on demurrer.

HEARD on demurrer, March Term, 1881, **TAFT, J.**, presiding. Demurrer sustained. The plaintiff alleged in his declaration that the defendant "received the plaintiff into one of its passenger cars to be by it safely and securely transported and conveyed over its said road for a certain hire and reward paid to the de-

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defendant and in consideration of the plaintiff's sending large amounts of freight over the defendant's said road, for which it received pay," etc ; and that the plaintiff was injured through the negligence of the defendant. The plaintiff pleaded the general issue, and two pleas in bar. In the second it was averred that the

"Said plaintiff was being carried by the defendant over the line of railroad in the plaintiff's declaration mentioned, without charge and free from expense, and in consideration thereof agreed to assume all risk of accident, and in consideration thereof further agreed that the defendant should not be liable under any circumstances for any injury to the plaintiff's person or loss or injury to his, the plaintiff's goods, while he, the plaintiff, was being carried over the railroad of the defendant on the occasion in the plaintiff's declaration mentioned ; and this the said defendant is ready to verify."

It was averred in third plea that the

"Plaintiff applied at the cattle station of the Boston & Lowell railroad company for a free ticket to pass the plaintiff over the railroad of the defendant, and the station agent at such station gave to the plaintiff and the plaintiff accepted and afterwards used a ticket for which the plaintiff paid nothing, and which the defendant allowed the plaintiff to use on the day and year aforesaid, according to the contract and conditions thereon stated, to pass the plaintiff without charge, and the plaintiff did use said ticket for that purpose, to pass the plaintiff without charge over the railroad of the defendant in the plaintiff's declaration mentioned, which ticket is substantially in the words and figures following, to wit. :

'BOSTON, CONCORD & MONTREAL R. R.

This ticket will pass Mr. O. Kimball, Concord to Marshfield, without charge ; he, in consideration thereof, assuming all risk of accident, and agreeing that the corporation shall not be liable under any circumstances, for any injury to his person, or loss or injury to his goods, while using this ticket. Not good unless used within three days from date.

(Issued by B. L. & N. R. R.)

B. F. KENDRICK.'

"And the defendant avers that the plaintiff procured and used on the day and year in the plaintiff's declaration mentioned, a ticket as aforesaid, with a full knowledge of its contents and from choice used said ticket, and himself assumed all risk of accident or injury to his person while a passenger upon the railroad of the defendant rather than purchase a ticket, so that by the laws of this State this defendant would have been liable for the injury in the plaintiff's declaration mentioned ; and this the said defendant is ready to verify."

S. C. Shurtleff, for the defendant.

The second plea does not amount to the general issue, as it sets up an agreement, which if valid avoids the right of recovery.

The third plea is good.

What is the general issue? It is a denial of all those facts in the declaration upon which the right of recovery depends. What

are they in this case? 1st, that the plaintiff has suffered damage; 2d, that it was caused by the negligence of the defendant; 3d, that the defendants were common carriers for hire and that plaintiff was being carried for hire, whereby it was its duty not to be negligent. The general issue denies. Now if what the plaintiff declares is true, the pleas deny only one of these facts, that is that the plaintiff was being carried for hire. Then it does not amount to the general issue. It amounts only to a *special issue*. Gould Pl., c. 2, ss. 38, 40; Gould Pl., c. 6, ss. 60, 61, 62; *Dutton v. Vt. M. F. Ins. Co.*, 17 Vt. 369; *Williams v. Vt. M. F. Ins. Co.*, 20 Vt. 222.

E. W. Smith, for the plaintiff.

The defendant's second and third pleas only amount to the general issue, and are therefore bad.

The opinion of the court was delivered by

ROWELL, J. The second and third pleas are attempted to be sustained on the ground that they are *special issues*. Instead of pleading the *general issue*, the defendant may, in some cases, effectually answer the declaration by a *special issue*, i. e., by *directly* denying some one material and traversable allegation in the declaration, and concluding to the contrary. Gould Pl. c. 6, s. 60. But such a plea never advances new matter, but merely *denies* some particular material and traversable allegation, the denial of which is, in effect, a denial of the entire right of action. Gould Pl. c. 2, s. 38. In England, such pleas were allowed as matter of convenience for the sake of confining the evidence to one single point, so that if the jury on that point gave a corrupt verdict, they might be more easily attainted than they could have been on the general issue, where the matter was more complicated. Issues of this sort were formerly not uncommon there; but they fell into disuse except in feigned issues, where they were, and perhaps now are, uniformly adopted, the pleas in those cases always being drawn with express admissions of all the facts stated in the declaration, except the particular fact that the issue was intended to try. Lawes Pl. [*523]. See forms of such pleas in 2 Chit.

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Pl. [* 239], and 1 Wentw. 120 to 140. Such pleas are to the particular allegation that they deny what the general issue is to the whole declaration. And they effectually deny the whole declaration ; for when each of several concurring facts is necessary to one entire cause of action, the denial of any of them is a denial of the whole cause of action.

But when the defence consists of matter of *fact* merely in *denial* of such allegations in the declaration as the plaintiff would on the general issue be bound to prove in support of his case, a special plea in bar is bad as amounting to the general issue. 1 Chit. Pl. [* 527] ; Steph. Pl. [* 418], Rule II. Such is the character of these pleas. The declaration alleges a consideration for carrying the plaintiff. On trial on the general issue, the plaintiff would be bound to prove this allegation as one of the essential elements of recovery, for such has he made his case by the declaration. The pleas, in an indirect way, deny this allegation by advancing new matter, showing a contract contradictory to that stated in the declaration, and conclude with a verification. They have no semblance to special issues, either in form or substance. They allege new matter, they contain no direct denial, they do not conclude to the country. Viewed as traverses, they tend to unnecessary prolixity, and are an argumentative denial and a departure from the prescribed form of pleading the general issue.

There is a great distinction between the case of a plea that amounts to the general issue and a plea that discloses matter that may be given in evidence under the general issue. In *Carr v. Hinchliff*, 4 B. & C. 547, a defence was put upon the record that, it was admitted, might have been gone into under the general issue and yet the plea held good. It is there said that there are instances in which a defendant has the option of giving his defence in evidence under the general issue or of putting it on the record. And those instances are said to be—1st, where the right of action is confessed and avoided by matter *ex post facto*, e. g., by a plea of payment, accord and satisfaction, and the like ; and 2d, where the plea *does not deny the declaration*, but answers it by matter of law, as, in *Hussey v. Jacobs*, 1 Ld. Raym, 87, which was an action against the acceptor of a bill of exchange, the de-

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fendant pleaded that it was given for money lost at play, and therefore void under the 16 Car. 2, c. 7. See also, *Maggs v. Ames*, 4 Bing. 470. In *Hayselden v. Staff*, 5 A. & E. 153, a plea setting up a different contract from the one declared on, was held ill as amounting to the general issue. In this case Lord Denman said, that "what, in correct language, may be said to amount to the general issue is, that for some reason specially stated, the contract does not exist in the form in which it is alleged; and when that is the case, it is an argumentative denial of the contract instead of being a direct denial, and which, according to the correct rules of pleading, is not allowable." In *Morgan v. Pebrer*, 3 Bing. N. C. 457, a plea setting up a contract incompatible with the one declared upon was held ill as amounting to the general issue. In *Lyall v. Higgins*, 4 Q. B. 528, a plea alleging a different consideration from that stated in the declaration was held bad for the same reason. PATTERSON, J., said, "It is now settled that the proper mode of traversing a consideration is by a plea of non-assumpsit." In *Potter v. Stanley*, 1 D. Chip. 243, a special plea in bar that the note declared upon was given without consideration was adjudged to amount to the general issue.

We are of opinion, therefore, that the pleas now before us cannot be sustained in form. As to the proper manner of taking advantage of a defect of this kind, we express no opinion further than to say, that by joining in demurrer the defendant waived whatever right it might otherwise have had to appeal to the discretion of the court, and the question may be decided on demurrer. Gould Pl. c. 6, s. 88.

Judgment affirmed and cause remanded, with leave to the defendant to plead on the usual terms.

TRIPP & BAILEY, ADM'RS. v. THE VERMONT LIFE INSURANCE CO.

Life Insurance. Action in Name of Administrator. Waiver. Tender.

1. The engagement of the company was : " And the said company do hereby *promise to, and agree with, the insured*, his executors, administrators, or assigns, well and truly to pay " *to the insured, &c.* Held, that the action to recover the amount of the policy could be maintained in the name of the intestate's administrators.
2. *Davenport, Admr. v. M. L. Association*, 47 Vt. 528, distinguished.
3. It is not necessary to set out in *hæc verba* in the declaration the several conditions in the policy, and then allege performance; or, to prove that the insured did not die in a due', or while employed on a railroad, &c.
4. The defendant by its dealings with the intestate in accepting payment on the premiums long after they were due, and by other acts, waived the condition in the policy, by which a failure to pay the premiums as soon as due should work a forfeiture.
5. No tender of the last premium was necessary.

ASSUMPSIT with general and special counts to recover upon a contract of life insurance. Plea, general issue, and trial by jury, September Term, 1879, Washington County, REDFIELD, J., presiding. The policy was dated July 24th, 1875. The intestate died on the 4th day of January, 1878. The second count, among other facts, alleged :

" That all the statements and declarations made to said company in said application, to wit, on said 24th day of July, A. D. 1875, to wit, at Burlington aforesaid, were true; that the said George R. Chapman during his lifetime, to wit, at Burlington aforesaid, paid to said company all sums of money required to be paid to said company by the terms of said policy at the times and in the manner required by said company; that the payment of the sum of money or premium due on the 24th day of July, A. D. 1877, was, to wit, on said 24th day of July, A. D., 1877, to wit, at Burlington aforesaid, not required by said company to be paid to said company by said George R. Chapman at the time named in said policy for the payment of the same, and the payment of the same at the time and in the manner named in said policy was

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then and there waived by said company; that the said George R. Chapman, during his lifetime, to wit, at Burlington aforesaid, performed and kept all and singular, the agreements and conditions on his part to be performed and kept."

The policy contained the following:

"And the company do hereby promise to, and agree with, the insured, his executors, administrators or assigns, well and truly to pay, at their office, the said sum insured, to the said George R. Chapman, or his assigns, on the 24th day of July, in the year 1913, or should the said person whose life is hereby insured as above, die before, then in ninety days after due notice and proof of the death of the said George R. Chapman during the continuance and before the termination of this policy, to his mother, Clara M. Chapman,—the balance of the year's premium being first deducted therefrom."

The premium was semi-annual, payable on the 24th days of January and July, of each year. Said Chapman was also an agent of the company. Mr. Gibbs, the secretary of the company, admitted on cross-examination, that the first premium falling due January 24th, 1876, was paid June 21st, 1876; that the premium which was to be paid when the policy issued in July was not paid till the next December; that both premiums of July, 1876, and January, 1877, were paid June 20th, 1877; that the said Chapman owned another policy in the same company, and that the company had paid it; and that he paid the premiums on that policy, sometimes in six, sometimes in nine, months, and one time, "almost a year," after they were due.

As to the premiums falling due July, 1877, Gibbs wrote Chapman as follows:

SEPTEMBER 6th, 1877.

"SIR: Herewith please receive for collection the following renewals for the month of July, 1877:

No. 140, due July 23, life insured. Geo. R. Chapman. Premium, \$9.72; dividend \$5.21; payment, \$4.51.

No. 986, due July 24; life insured, Geo. R. Chapman. Premium, \$21.22; dividend, — — —; payment, \$21.22.

These should have gone forward before, but as you were away on your wedding trip, did not do it at the time, and have overlooked these renewals since."

The following is a part of the testimony of Mr. Gibbs:

Q. This first premium after the policy issued, this premium due January 24, '76, was paid June 21st, '76? A. Yes, the second semi-annual premium.

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Q. That was paid about six months after it was due? A. Well, from January to June, nearly five months.

Q. The next payment due July 24, '76, was paid about a year after? A. Yes. Mr. Roberts—ten months and twenty-six days.

Q. The third payment, due Jan. 24, '77, was paid June 19, '77? A. No, paid at the same time, June 20th.

Q. That was paid the June after it was due? A. Yes, sir.

Q. Mr. Chapman had another policy in your company, didn't he, that has since been paid? A. Yes.

Q. What was the amount of that policy? A. \$1000.

Q. Wasn't it the practice of the company to defer the collection of the premiums on their policies just as they had on this one? A. No, sir; he took his chances; he never had any liberty to do it. We accepted the money when it came. The other policy was treated precisely like this.

Q. That is, the premiums were paid upon it along from time to time? A. Yes, sir.

Q. You didn't require that payments should be made upon it when they were due? A. No, sir. We required, as the instruction will show, that he should make his report, the business done in one month, the next month. The instructions will show that all the way through.

Q. He didn't do it, did he? A. Not along to the last, he didn't.

A. This policy was a quarterly premium policy. The premium of July 24, was paid in his report of Dec. 4, of the same year.

Q. The December after? A. The December after. The one for October was paid Dec. 31.

Q. When was the next premium due paid? A. The one for January 23, was paid June 13, '76.

Q. When was the next payment due paid? A. April was paid Oct. 2d, '76, due April 23.

Q. When was the next payment paid? A. The next one would be July, that wasn't paid till June 20, '77.

Q. Almost a year? A. Yes.

Q. When was the next premium due, paid? A. It was paid the same time.

Q. When was it due? A. Oct. 23, paid June 20, '77.

Q. About nine months after? A. Yes.

Q. When was the next premium due and when paid? A. It was the January premium, and paid June 20, 1877, due Jan. 23.

Q. About six months after? A. Yes, and that was the last on that policy. No premium received after Jan. 23, 1877.

Q. Wasn't it your custom to permit the policy holders in Mr. Chapman's agency to make payments of their premium after the policies had lapsed by their terms? A. No, I can't tell when Mr. Chapman received the money from a single policy holder. I could 'nt tell without corresponding with them. I never did it.

Q. Didn't you know, as secretary of the company, that the policy holders didn't pay their premiums when they were due on most of the policies? A. I knew he said so sometimes.

Q. Didn't you know it from his representations to the company? A. I knew so from him.

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The court charged the jury, in part :

“ The case must rather stand upon an agreement to let this run, to give credit, to postpone the time of payment. Now, was there such an agreement ? There was no negotiation for a special agreement, but the case is submitted to you ; if, upon the intercourse, the business communications, the business relations between the defendant and Chapman, who was an agent of theirs at Vergennes, he had a right to believe the defendant had given him to understand, and he had a right to understand from what they had written to him, in their manner of deal with him, that this premium of July 24th, 1877, might be paid at any future time, or at some future time long enough to cover the term of his life, which was in this case the 4th of January, 1878 ; and we require you to find that that agreement, that the conduct, declarations, letters, manner of dealings gave this insured to understand, and, as a business man, he did understand, that the company agreed to waive that payment beyond or up to the 4th of January, 1878, notwithstanding there should intervene occurrences materially affecting the risks, such as sickness, the indications of a speedy death, and, notwithstanding that death should occur ; that such an agreement was absolute in its character, and notwithstanding intervening occurrences however affecting this risk, he had a right to understand, and did understand, that this company agreed to keep this policy in force against such contingencies without the payment of the premium.

Well, now this inquiry comes down substantially to this : Did the company agree, or give Chapman in this case, to understand that whether he complied with the terms of the policy as to the payment of the premium or not, that notwithstanding it might be delayed and he become sick, and in such condition that the company would not take a policy on his life, still he did understand and had a right to understand, notwithstanding such an occurrence as that the company would stand in and keep this policy alive and pay this \$2,000 at his death ?

I am unable to state to you what appears on the books, particularly what appears in these letters, but I think it may be assumed that in many cases through their agencies the company has taken the premium voluntarily, and thus renewed the policy when, by its terms it had come to an end. And it is shown to you by the secretary that the insured being substantially what he was before, it is for the interest of the company, and they would, in any case within a reasonable time, the insured being in health, revive the policy, because it is easier and better than it is to get a new one ; but the plaintiff claims that this had been so universal that the in-

sured in this case had a right to understand, and did understand that there was no need of his hastening to Burlington and seeing that that premium was paid the company, and given him assurance by the manner of deal and by the manner of correspondence; by all these circumstances they had given him assurance that if evil befel him, he lost his health, if a fatal sickness came upon him, there was no need of paying the premium at present; the company had stood in such relation with him that they would carry this policy alike for his protection.

Now, if you find that true by a fair balance of testimony after weighing all these circumstances, that the defendant corporation came into such an arrangement and agreement, then we think they should abide by it; they should pay, if they agreed to pay; if the defendant company gave him fairly and justly to understand, 'we shall carry your policy and keep it alive when by its terms it has been ended,' when the period covered as in this case, was the life of Mr. Chapman, and there was such an absolute understanding that notwithstanding the intervening sickness, fatal sickness, still they must keep it alive and pay it; if you find that there was such an agreement, then the defendant should stand to it."

The court submitted the following question to the jury:

"Did the defendant in this case agree with the insured to waive the payment of the premium that became due July 24th, 1877; or, agree to postpone its payment, either indefinitely or for a period covering the lifetime of the insured, notwithstanding intervening occurrences affecting the risk, as in this case, sickness and death of the insured"?

The jury gave an affirmative answer; and also returned a general verdict for the plaintiffs.

R. S. Taft and Roberts & Roberts, for defendant.

The suit is not maintainable in the name of these plaintiffs. It should have been brought in the name of Clara M. Chapman, the beneficiary.

The Vermont cases are: *Figure v. Mutual Society*, 46 Vt. 362; *Davenport v. Mutual Life Ass'n*, 47 Vt. 528; *Fairchild v. N. E. Mutual Life Ass'n*, 51 Vt. 613. These leave the question undecided. See further: *Bliss Life Ins. ss.* 317, 318, 320; *Hoyle v. Guardian Life Ins. Co.*, 6 Robertson, 567; *Ruppart v. Union Mut. Ins. Co.*, 7 Robertson, 155; *Myers v. Keystone Mut. Life Ins. Co.*, 27 Penn. 26; *In re Kugler*, 3 Big. Life Ins. Rep. 592.

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There was a variance between the contract declared upon and the contract produced in evidence. They were not legally identical.

Good pleading required the statement of these conditions, and performance of the same, in order to a recovery. 1 Ch. Pl. 309, 310, p. 338-340; *Kimball v. Rut. & Bur. R. Co.*, 26 Vt. 247; *Mann v. Birchard*, 40 Vt. 326; *Patch Ins. Co.*, 44 Vt. 481; *Woodstock Bank v. Downer*, 27 Vt. 482; 36 Vt. 172; Rob. Dig. 787.

If the waiver spoken of could be tortured into an agreement such as is claimed, it was necessary that it should be set out in the declaration in its scope, details, consideration, etc. Ch. Pl. 358.

As to a parol waiver of performance of the conditions of a written contract, or change in it, a distinction is taken between cases where the waiver or modification is used as matter of defence, and where used as a ground of action. *Porter v. Stewart*, 2 Aik. 417; *Lawrence v. Dole*, 11 Vt. 549; *Dana v. Hancock*, 30 Vt. 616, 620; *Sherwin v. Rut. & Bur. R. Co.*, 24 Vt. 347; *Flanders v. Fay*, 40 Vt. 316; *Hydeville Co. v. Eagle R. Co.*, 44 Vt. 395, 403.

There was no waiver. May Ins. 346, 35', 357; *Franklin Ins. Co. v. Sefton*, 53 Ind. 380; *Want v. Blunt*, 12 East. 183, (2 Big. Ins. Rep. 201); *Tarleton v. Staniworth*, 5 T. R. 649; *Mut. Ben. L. Ins. Co. v. Ruse*, 8 Ga. 534, (Bliss' Life Ins. s. 197); *Ruse v. Mut. Ben. L. Ins. Co.*, 23 N. Y. 516; *Simpson v. Ins. Co.*, 88 E. C. L. 256; (2 Big. Ins. Rep. 497); *Pritchard v. Life Ins. Co.*, 3 C. B. (N. S.) 622, 91 E. C. L. 619; (2 Big. Ins. Rep. 544); Bliss Life Ins. ss. 196, 200; *Thompson v. Knickerbocker Life Ins. Co.*, 5 Big. Ins. Rep. 8.

There was no consideration for the supposed agreement to extend the time of payment. May Ins. 362; *Edge v. Duke*, 18 L. J. Ch. 183; *Few v. Perkins*, L. R. 2 Exch. 92; *Patchin v. Lam-born*, 31 Penn. St. 314.

Charles W. Porter, for plaintiffs.

The action was properly brought in the name of the administrators. *Pangborn v. Saxton*, 11 Vt. 79; *Hall v. Huntoon*, 17 Vt. 234; *Corry v. Powers*, 18 Vt. 587; *Phelps et al. v. Conant*,

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30 Vt. 288; *Fugure v. Mutual Society*, 46 Vt. 362; *Davenport v. Insurance Co.*, 47 Vt. 528.

This is the general rule. 1 Chit. Pl. 416; *Mullen v. Whipple*, 1 Gray, 321; *Carr v. Bank*, 107 Mass. 45; *Colboone v. Phillips*, 13 Gray, 61, 66; *Bailey v. Ins. Co.*, 114 Mass. 177.

The declaration set out all that was necessary. May Ins. s. 589; Chit. Pl. (16 Am. Ed.) 329, 705; *Newton v. Brown*, 49 Vt. 18; *Gates v. Bowker*, 18 Vt. 23. There was a waiver. May Ins. ss. 361, 363; *Hanley v. Life Association*, 69 Mo. 380; *Insurance Co. v. Doster*, U. S. Supreme Ct., Oct., 1882; *Life Ins. Co. v. Warner*, 80 Ill. 411; *Dilleber Ins. Co.*, 76 N. Y. 587; *Young v. Ins. Co.*, 4 Big. Life Ins. Cases, 5; *McCraw v. Ins. Co.*, 78 N. C. 149; *Thompson v. Ins. Co.*, 4 Big. Ins. Cases, 165. The waiver need not be founded on a new consideration. 77 N. Y. 483; 26 Iowa, 483.

The opinion of the court was delivered by

POWERS, J. I. It is insisted that the action was improperly brought in the name of Chapman's administrators.

In the case of *Davenport, Adm'r of Twombly, v. N. E. Mut. Life Association*, 47 Vt. 528, which was an action of assumpsit upon a policy of life insurance, it was held that the action was improperly brought in the name of the administrator. But an examination of that case will show that the decision was based upon the averment in the special count that the defendant "undertook and then and there faithfully promised to pay to the wife and children, or their legal representatives, &c." To this count there was a demurrer; and in accordance with the rule that on demurrer pleadings will not be helped out by inferences, the court held that the promise alleged was express to the wife and children and no promise to the intestate, whom the plaintiff represented, was to be inferred. In the case at bar the engagement of the company is expressed as follows: "And the said company do hereby *promise to, and agree with, the insured*, his executors, administrators or assigns, to pay, &c., . . . (and in case of his death before A. D. 1913), to pay his mother, Clara M. Chapman, &c."

Here it is seen the contract is made with Chapman; the consid-

eration moved from him; the promise moved *to him*, and the action is for the breach of this promise. Clara M. Chapman is in a contingency the *beneficiary* of the contract, but is not a *party* to it. The *promise* upon which the obligation of the defendant to pay, *rests*, was made to the intestate, and his representatives alone can enforce it.

II. It is further claimed that there was a variance between the declaration and the evidence offered in support of it. This objection went upon the ground that the several conditions embodied in the policy were not set out in the count, and compliance with their terms, by the insured averred—except as to the fourth condition, the count alleges “that the said George R. Chapman during his lifetime, to wit, at Burlington aforesaid, performed and kept all and singular the agreements and conditions on his part to be performed and kept.” It would be useless to set out the conditions *in haec verba* and then proceed with proper language to allege performance of the same. To entitle the plaintiffs to recover, it is not necessary to make proof that the insured did not die in a duel, or while employed on a railroad, or while engaged in any of the various hazardous employments specified in the conditions of his policy. Why then necessary to aver such facts? The most elaborate and detailed recital of the conditions with the fullest and most technical allegation of compliance therewith, amount to nothing more than a statement that the insured has kept and performed his agreement.

As to the fourth condition, the count avers a waiver of the payment of the premium due July 24th, 1877. The policy makes the payment of the premium on the day named a condition precedent to the further continuance of the contract. If the plaintiffs had offered the policy alone in evidence it is clear that there would be a variance between the count and the evidence. But the plaintiffs supplemented the evidence afforded by the policy by proof that compliance with the fourth condition had been waived by the company and thus the proofs accorded with the allegations in this respect.

If a written contract has been varied in its terms by the par-

ties, the new or varied contract is the one upon which suit is to be brought; and if one of the parties thereto has been excused from the performance of a condition imposed by the contract upon him, this excuse should be set forth in the declaration, if the party expects to offer proof of it on trial.

III. Finding no difficulty with the question of pleading raised, we come to the more substantial and doubtful question whether the evidence disclosed a waiver of the fourth condition, so far as the same required the payment of the current premiums as they matured.

The language of this condition is, "in case the premium shall not be paid to said company, on or before the time herein mentioned for the payment of the same, then and in every such case . . . this policy shall cease and determine."

There is much conflict in the authorities upon this question of waiver; but the trend of the decisions is in the direction of upholding the contract in cases where the insurers by this course of dealing with the insured have given him the right to understand that a strict compliance with the language of the condition requiring payment of his premiums on the day fixed, would not be exacted. The requirement of such payment is inserted in the contract for the benefit of the insurers, and is voidable at their election. If they see fit to waive the condition, the policy continues obligatory upon them on its original terms. The evidence tended to show that not only respecting the policy in question but respecting another policy held by Chapman and others procured through his agency, the company had in many instances, accepted premiums overdue for periods ranging from five months to nearly a year. In these instances the company had the right to declare the policies forfeited, but had elected to treat them as on foot and to collect the premiums as soon as they could. This evidence with other kindred facts shown, fully warranted the court in submitting to the jury to determine whether the company, by its course of dealing, had given Chapman to understand that the fourth condition of his policy would not be insisted upon, and whether he would have indulgence respecting his payments.

The special question submitted, examined in connection with the charge of the court, is not objectionable in form. If the indulgence granted to Chapman was indefinite as to time and was granted under such circumstances as to estop the company from now repudiating it, it had all the force of an agreement for delay. The scope of the question could not have been misapprehended by the jury in view of the instructions given them. The jury was in substance told that to warrant a recovery the indulgence must have been granted in duration, long enough to cover Chapman's life, and absolute enough in character to cover intervening occurrences affecting the risk — as for instance — sickness and death. But the general verdict for the plaintiff rests upon the same basis as the special one; the latter, therefore, was unnecessary.

The company insists and has insisted since Chapman's death that the policy lapsed July 24th, 1877, by the non-payment of the premium then due. It is not apparent how a tender of that premium by the administrators would affect their right of recovery under such circumstances. The policy provides that the sum payable is to be redeemed by any balance of unpaid premiums for the year. Some other points were made in argument, but the views herein expressed render discussion of them unnecessary.

The decision herein announced is the conclusion of the majority of the court.

Judgment affirmed.

***FREDERICK CHAFFEE v. RUTLAND RAILROAD COMPANY
AND TRUSTEES.**

Preferred Stock. Dividend on, Ratified, Estoppel. The company cannot plead its own wrong. Action in name of Holder of Certificate.

1. Two mortgages resting on the R. & B. R. R. Co., it being operated by the trustees of the second mortgage bondholders, a suit pending to foreclose the first mortgage, and during the pending of this suit a charter having been obtained for the defendant company, in the interest of the second mortgage bondholders, the defendant by corporate vote, under the authority of the charter, issued \$4,300,000 of "preferred or guaranteed stock, commonly called preferred guaranteed stock," also, \$2,500,000 of common stock, to liquidate the first mortgage bonds and other claims resting on the property. The charter provided that the said guaranteed stock should "be entitled to receive dividends from the earnings and income of the corporation;" that it "shall pay and shall be liable to pay such dividends;" that, "until declared, interest shall be added to each dividend;" and that no dividend should be paid on the common stock "until a dividend is made on said preferred stock." The defendant having issued certificates of "scrip dividends" in "settlement of dividends" on the said preferred stock, in an action of assumpsit to recover the amount of some of said certificates. *Held*, that a preferred stockholder is not a creditor; that a creditor's lien is prior to the right of a stockholder; that a right to a dividend is not a debt; that dividends on preferred stock are payable only out of net earnings which are applicable to the payment of dividends; that a stockholder is not entitled to any dividend of the profits until all the debts are paid; that the stock and property of a corporation is a trust fund pledged for the payment of its debts; and that there is no right to declare a dividend until there is a fund from which it can properly be made.
2. But, the company having issued the certificates without objection by any stockholder or creditor, which certificates were convertible into the company's bonds on demand or at the option of the holder, the company having converted all or nearly all of the certificates into bonds, except the plaintiff's, having ratified them, and never having denied their validity, and having so acted that it is estopped to deny their validity, *general assumpsit, will lie to recover the amount of the certificates, the company on demand having refused both to convert them into bonds or to pay them*; and this is so although at the time the scrip dividends were issued the net earnings were insufficient to pay them, the current expenses, and the floating debt of the company, said debt having been very largely reduced when this suit was brought, and it not appearing that the same treatment of the plaintiff's certificates with the others would have embarrassed the company.
3. Having issued the certificates, ratified them, and all the other preferred stockholders having received the fruits thereof, *the company itself cannot plead its*

* This case was argued twice before the full bench.

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own wrong in defence by showing that they were illegally issued, or that it had no authority to exchange bonds for certificates, it not appearing that this was necessary to protect itself from embarrassment, or creditors from loss.

4. The plaintiff was a stockholder, and so affected by constructive notice to a certain extent of the acts of the company and its officers, but in fact had no part in what was done; and, hence, stands in no such equal fault as to warrant a denial of remedy.
5. The certificates ran to the *holder*, went on the market, were purchased by the plaintiff; and the defendant had always treated him as though an original holder, and the certificates as running to *bearer*. *Held*, that the plaintiff could sustain the action *in his own name*; and that it was not a question of negotiability; but how the defendant had treated the certificates, &c.
6. All the issues of certificates were authorized by nearly, if not entirely, unanimous votes of the corporation, followed by votes of the directors. They were issued from time to time from 1872 to 1875, inclusive. The company never denied but always recognized their validity by its corporate action, the repeated votes of its stockholders and directors, the representations of its officers, authorized to issue them, and by the issuing of new bonds, even after the bringing of this suit, to take up the certificates. *Held*, that it was a ratification; and that the defendant was estopped from denying their validity.
7. The last two issues of certificates did not contain the convertibility clause; but they had always been converted into bonds the same as the earlier numbers, and the president of the defendant,—the officer who had charge of converting them—told the plaintiff, before he purchased, that they were convertible into bonds, and showed him the stockholders' vote to that effect. *Held*, that they should be treated the same as the other certificates.
8. The company cannot now deny the consideration in the certificates, having always treated them as though given in surrender of a dividend actually earned and warranted, and issued in settlement of dividends.
9. **TRUSTEE PROCESS.**—The Cheesire Railroad Company, one of the trustees named in the writ, is a foreign corporation. The process alleged that said company "has an authorized agent resident within the State of Vermont at Bellows Falls, in the town of Rockingham and the county of Windham and said State." Such allegation is sufficient to give the court jurisdiction, when legal service has been made.
10. The office of allegations by a trustee under section 1094, R. L., is not to present for trial the same issues raised and tried between the principal parties; and allegations for that purpose will be dismissed on motion.
11. Improper use of the term *ultra vires* referred to.

GENERAL assumpsit. Heard on the report of a referee, September Term, 1879, Rutland County, DUNTON, J., presiding. Judgment *pro forma* for the defendant. The case was referred to Hon. JONATHAN ROSS, who reported substantially the following facts. The action was brought to recover the amount of certain certificates. The following are copies:

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[No. 1.]

SCRIP DIVIDEND, RUTLAND RAILROAD, FEBRUARY 1, 1872.

RUTLAND RAILROAD COMPANY.

\$..... RUTLAND, VT., February 1st, 1872.

This certificate entitles the holder to the sum of..... Dollars, with interest thereon after date, in settlement of dividends on the Preferred Guaranteed Stock of the RUTLAND RAILROAD COMPANY, and is to be paid whenever the Company, from its earnings, shall have extinguished its floating debt, and have a sufficient sum to pay the dividend of which this Scrip is a part.

By a vote of the Company this Certificate may be exchanged on demand into seven per cent. Income bonds of the Rutland Railroad Company at par, with adjustment of interest.

No..... Treasurer.

[Nos. 2, 4 and 5, dated respectively Aug. 1, 1872, Aug. 1, 1873, and Feb. 2, 1874.]

SCRIP DIVIDEND, RUTLAND RAILROAD.

RUTLAND RAILROAD COMPANY.

\$..... RUTLAND, VT., August 1st, 1872.

This certificate entitles the holder to the sum of..... Dollars, with interest thereon after date, in settlement of dividends on the Preferred Guaranteed Stock of the RUTLAND RAILROAD COMPANY, and is to be paid at the option of the Company.

No..... Treasurer.

By vote of the Company this Certificate may be exchanged on demand into any Bonds that the Company may issue.

[No. 3.]

SCRIP DIVIDEND. RUTLAND RAILROAD, FEBRUARY 1st, 1873.

RUTLAND RAILROAD COMPANY.

\$..... RUTLAND, VT., February 1st, 1873.

This certificate entitles the holder to the sum of..... Dollars, with interest thereon after date, in settlement of dividends on the Preferred Guaranteed Stock of the RUTLAND RAILROAD COMPANY, and is to be paid at the option of the Company, and convertible at the option of the holder into the 8 per cent. First Mortgage Bonds of the Company.

No..... Treasurer.

Nos. 6 and 7, dated respectively Aug. 1st, 1874, and Feb. 1st, 1875, were like Nos. 2, 4 and 5, except they did not provide for their exchange into bonds.

There were two mortgages on the Rutland and Burlington R. R. Co. The charter was to the second mortgage bondholders, or in their interest; and the issue of preferred stock was intended to be used to liquidate the first mortgage debt of the company, and such claims as were resting on the property prior to the second mortgage debt. The 8th and part of the 9th section of the act of incorporation passed in 1876, are as follows:

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"SEC. 8. Said corporation shall be authorized, upon vote of their directors, to issue a preferred or guaranteed stock, for the purpose of satisfying, paying or purchasing prior claims or incumbrances upon or interest in said road and property, and not exceeding in amount the amount justly due upon said prior claims or incumbrances. And such stock may be exchanged for such prior claims or incumbrances, upon such terms as may be agreed on. And said preferred or guaranteed stock, when so issued, shall be entitled to receive dividends from the earnings and income of said corporation at the rate of seven per cent. per annum, payable semi-annually, free of United States tax, before any other dividends shall be made therefrom. And said corporation shall pay and shall be liable to pay such dividends on said preferred stock semi-annually from their earnings or income. And until declared, interest shall be added to each dividend from the end of the half year when the same shall be declared. And no dividends shall be paid on the common stock of said corporation until a dividend is made on said preferred stock, nor while any semi-annual dividend on said stock or interest thereon herein provided for, remains undeclared. And no mortgage of said road and property, or any part thereof, shall be made by said corporation that shall take precedence of said preferred or guaranteed stock in the application of the income of said corporation."

"SEC. 9. No preferred or guaranteed stock shall be issued by said corporation, unless an equal amount of claims or incumbrances on said road and property prior to that of said corporation shall be thereby satisfied, retired or exchanged therefor."

Amendments were made to the charter, and are found in the acts of 1868, page 217; of 1870, page 339; and of 1872, page 381. The defendant owed a floating debt, August 1st, 1868, \$131,717.39; Aug. 1st, 1869, \$212,402.07; Aug. 1st, 1870, \$138,215.84; Aug. 1st, 1871, \$1,282,532.62; Feb. 1st, 1872, \$1,561,588.82; Aug. 1st, 1872, \$1,475,418.02; Feb. 1st, 1873, \$866,045.81; Aug. 1st, 1873, \$769,888.16; Feb. 1st, 1874, \$606,873; Aug. 1st, 1874, \$782,146.11; Feb. 1st, 1875, \$714,060.28; Aug. 1st, 1875, \$656,015.45; Feb. 1st, 1876, \$823,794.14; Aug. 1st, 1876, \$413,711.20; Feb. 1st, 1877, \$361,375.99; Aug. 1st, 1877, \$314,710.85; Feb. 1st, 1878, \$358,532.98; Aug. 1st, 1878, \$395,250.07; Feb. 1st, 1879, \$374,426.33; Aug. 1st, 1879, (estimated) \$340,000.

The defendant railroad had been leased, February 8th, 1871, to the managers and receivers of the Vermont Central and Vermont and Canada Railroads, and its income was from rents when the certificates were issued. * It had issued \$4,300,000 of pre-

* The vote by the stockholders authorizing the preferred stock was as follows:

"Resolved, That for the purpose of satisfying, paying, purchasing or exchanging the prior claims or incumbrances or interests in the Rutland & Burlington Railroad

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ferred guaranteed stock, and \$2,500,000 of common stock, prior to February, 1872. On April 28, 1870, it had also issued \$500,000 of its seven per cent. bonds; and on September 15th of the same year, \$500,000 of eight per cent. bonds; both secured by mortgage on its rolling stock and equipments. The seven per cent. bonds were given as a *bonus* to the subscribers and owners of the preferred stock; the eight per cent. bonds were issued to equip and furnish the railroad, and pay debts contracted for that purpose.

As to the capacity of the defendant to pay the floating debt, current expenses and the certificates, the referee reported :

✓ “From the foregoing facts I find that if the floating debt and current expenses were to be first paid out of rent or income received, the defendant has had no funds with which to pay the plaintiff's certificates, and had none at the time the demands were made. ✓ If the preferred stock was entitled to be paid dividends before the floating debt, the income of the company from rents at the time of the demands had been sufficient to pay all such certificates issued by the defendant. The rents received from Aug. 1, 1871, to Feb. 1, 1875—the period for which scrip certificates were issued in payment of dividends on the preferred stock—were more than enough to pay these dividends in cash if first applied thereto, and nearly or quite enough to pay in addition the interest on the equipment bonds and the first mortgage eight per cent. bonds sold.

“This question as to which has the first right to the income, is submitted to the court on the facts reported, as also is the question whether the plaintiff at the time of said demands or either of them, on the facts reported was entitled to receive eight per cent. first mortgage bonds for any, and if so for how many, of said certificates, and whether if entitled to receive such bonds, the refusal to furnish them, or to comply with his demands, entitled him to recover the amount of such certificates and interest of the defendant.”

Company, that this company issue to the holders of such claims, certificates of preferred stock of this company, in shares of one hundred dollars each, equal in amount to the principal and interest on such claims, encumbrances or interests up to August 1st, 1867, agreeably to the act of the Legislature incorporating this company, securing to the holders of such stock, dividends upon the par value thereof, of three and one-half per cent., free of United States tax, payable semi-annually, on the first days of February and August in each year, commencing on the first day of February, A. D. 1868.”

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As to the issuing of the certificates :

“ At the annual meeting of the stockholders, holden January 30th and 31st, 1872, the company was found to have a floating debt of over a million and a half dollars. This was a surprise to many of the preferred stockholders. . . . At this meeting the following resolution was passed :

‘ *Resolved*, That the directors be authorized and are hereby instructed to prepare and issue to the holders of the preferred stock, a scrip dividend of three and a half per cent., to date February 1st, 1872, upon forty-three thousand shares of preferred stock; and also that said directors are hereby instructed to issue, as the necessities of the road in payment of accruing dividends, and the debt of the corporation may require, a seven per cent. bond, not exceeding twelve hundred thousand dollars in amount, such bonds to bear date February 1, 1872, payable twenty years from date; with interest payable semi-annually, on the first days of February and August of each year, secured upon the income of the corporation, to be disposed of in liquidation of the debt, at not less than the par value, provided, that the scrip dividend upon the preferred stock shall in sums of not less than one hundred dollars, be at all times convertible into such seven per cent. bond, dollar for dollar of principal and interest until such time as the corporation shall resume dividends payable in cash upon the preferred stock.’

“ Accordingly the directors caused to be issued to the preferred stockholders certificates, of which No. 1 is a copy.”

Also the following :

“ *Resolved*, That Messrs. Edward Blake, A. W. Spencer and Jacob Edwards, as a committee of the stockholders, be appointed to act as an advisory committee with the directors, in matters relating to the finances of the corporation, with power to make such examination of the accounts and business of the company as may in their judgment promote the best interests of the stockholders. Such committee to make report at a future meeting of the stockholders.”

The advisory committee called a meeting of the stockholders, March 13th, 1872, to hear its report, and see whether the vote authorizing an issue of bonds not exceeding \$1,200,000 should be modified or rescinded. At the annual meeting the directors were also called upon to make and publish a report to the stockholders of the financial condition of the road to January 30th, 1872.

“ At the said meeting and at other times the preferred stockholders to some extent if not generally were claiming that they were entitled to the income and earnings of the property to the extent of the dividends on their preferred stock provided for by the charter, whether the floating debt was paid or not. The advisory committee, at the March meeting, reported on this subject as follows :

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‘It has generally been understood that the preferred stock in the Rutland Railroad Company carried all the security of a first mortgage, and that was undoubtedly the intention when the charter was obtained, as the object was to offer the strongest inducements possible to the holders of the first mortgage bonds of the Rutland and Burlington Railroad, to surrender their bonds and take the preferred stock of the Rutland Railroad Company, and as between the preferred stock and the common stock, and *in the absence of any unsecured debt*, it is to all intents and purposes a first lien upon the property; but by the general law of Vermont, any legal indebtedness of the company would take precedence of it, and while no mortgage can be put upon the property as the charter now exists, the laws of Vermont leave no room to doubt that the rights of the preferred stock are subordinate to those of the creditors. We desire to set the stockholders right on this point before submitting our proposition.’ This committee presented a plan to said meeting, and the president presented another plan. Both were for the relief of the company from its floating debt. The stockholders, after discussion, Voted, First, to appropriate the income of the road to the payment of the outstanding indebtedness, until it is provided for in the manner herein stated.”

‘Second, to rescind that portion of the vote passed at the last annual meeting of the company authorizing the issue of a seven per cent. bond, and the conversion of the scrip dividend, authorized by said vote, into seven per cent. bonds.”

“Third, to pay future dividends on the preferred stock of the company by issuing to the holders thereof scrip (dividends) therefor as the same may become due, until the debts of the company are provided for, as herein stated.”

‘Sixth, Voted, that in the event of the failure of the stockholders of this company to take the stock hereinbefore provided for, that the directors of the Rutland Railroad Company are hereby instructed to petition the General Assembly of the State of Vermont at its session in October next, for such an amendment of their charter as will authorize the company to make and execute a mortgage on its franchise, railroad, depots, machine-shops, and property now under lease to the trustees and managers of the Vermont Central and Vermont and Canada Railroads, not including the rolling stock already mortgaged for the payment of five hundred thousand seven per cent., and five hundred thousand eight per cent. equipment bonds and exclusive of the steamboat property, as security for an issue of bonds, to be known as first mortgage bonds, and not to exceed in amount one million five hundred thousand dollars, redeemable within thirty years, and to bear interest at a rate not exceeding eight per cent. per annum, payable semi-annually in the city of Boston.”

“The plaintiff, soon after this meeting, May 11, 1872, became the owner of quite an amount of the preferred stock, and continued to be such stockholder until January 28, 1878, when he transferred two hundred and twenty-five such shares, being all he owned; but he never attended any of the stockholders’ meetings while such owner; nor did he attend the annual meeting in 1872; nor the special meeting holden in March of that year when the foregoing votes were passed.”

“I find that during all the time since the organization of the

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defendant corporation, the plaintiff has resided in the village of Rutland where the meetings of the stockholders of the company were held, and took the *Rutland Daily Herald* in which the proceedings of said meetings and the substance of the annual reports to the stockholders were published."

"May 4, 1872, at a regular meeting of the directors of the defendant, it was

'Voted, That scrip be issued in payment of the dividend for August next upon the preferred stock of this company, said scrip to be payable at the option of the company with interest at six per cent., and convertible into any bonds that the company may issue.'

Accordingly the treasurer issued to the preferred stockholders certificates, of which No. 2 is a copy.

The directors obtained an amendment to the charter at the session of the Legislature, 1872, (Session Laws, page 382,) as follows :

"SECTION 1. The Rutland Railroad Company, if it shall vote so to do, at a meeting of the stockholders called for that purpose, shall have power to issue their notes or bonds for the purpose of raising means to *pay the indebtedness of said company*, which notes or bonds shall bear interest at a rate not exceeding *eight per cent.*, and may be secured by mortgage, and in such manner as said company shall deem expedient."

"A stockholders' meeting was duly holden October 21, 1872, at which a mortgage of the property, specified in the vote of March, 1872, was authorized, and the same was duly executed to secure the payment of \$1,500,000 of the defendant's bonds, having thirty years to run and bearing interest at the rate of eight per cent., payable semi-annually. The bonds are called the first mortgage eight per cent. bonds, and were duly issued to the amount named.

The vote authorizing their issue provided that these bonds should "be sold only to retire an equal amount of claims against, or indebtedness of, the company now outstanding or in exchange therefor."

"The directors on the same day,"

"Voted, That the officers of this company be directed to notify the stockholders thereof and the holders of scrip and other forms of indebtedness of the company, that an eight per cent. mortgage bond, having thirty years to run, has been authorized by the stockholders in special meeting this day, to be issued, and that said bonds are ready for sale to the stockholders, or exchange with said holders of scrip, &c.

Such notice was duly published to the stockholders. The directors at a meeting July 25, 1874,

"Voted, That the dividend on the preferred stock of this company, due August 1st, next, be paid in the scrip of this company in the same way and manner as dividends have been heretofore paid."

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Accordingly certificates were issued of which No. 4 is a copy.

At a directors' meeting January 27th, 1874, it was voted, "That the matter of further issue of scrip be referred to the stockholders." At a stockholders' meeting holden the same day it was voted,

"That the scrip dividend to be hereafter declared be made convertible hereafter as heretofore into the eight per cent. bonds of the company at par, and that scrip shall be entitled to an interest of six per cent. thereon until converted or paid."

At a directors' meeting holden subsequently on the same day, it was voted "To pay the next dividend on the preferred stock in scrip on and after the 9th proximo." The treasurer issued to the preferred stockholders scrip certificate No. 5, in form and language in all respects like Nos. 2 and 4, except it was dated February 2d, 1874.

At a meeting of the directors holden, July 28, 1874, the following action was taken :

"Whereas, It was voted at a meeting of the stockholders of this Company, on the 27th of January, 1874, that the scrip dividend hereafter to be declared, be made convertible into the eight per cent. bonds of the company ; and whereas, the company is now compelled to secure a portion of its floating debt by a pledge of all its eight per cent. bonds now unconverted, it is voted by this board that until the floating debt of this company shall be so far paid that such bonds can be redeemed from any pledge for its floating debt the scrip hereafter to be issued shall not bear upon its face any contract for such convertibility." This action of the directors was known to many of the stockholders, but was not known to the plaintiff until after this suit was commenced.

Accordingly when the next certificates, No. 6—were issued, they did not contain the convertibility clause. January 27th, 1875, the directors in meeting,

"Voted, In accordance with instructions given the directors by the stockholders at their last annual meeting,—that the treasurer be directed to issue the scrip of the company in payment of the dividend due on the 1st day of February next on the preferred stock."

The treasurer issued, accordingly, certificates,—No. 7,—in form and language like No. 6, except the date.

The directors, July 26th, 1877, in meeting,

"Voted, Whereas certain promises have been given in relation to the conversion of scrip into bonds of the company amounting to about ten thousand dollars (\$10,000), the president and treasurer are authorized to make such conversion, and thereafter no more of the scrip shall be converted, until the floating debt of the company is fully extinguished."

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Also in another directors' meeting, December 6th, 1877, it was voted to offer such certificate-holders a six per cent. twenty years income bond in exchange for such certificates; and also to authorize the issue of such bonds, "provided that in the opinion of the counsel of the company there are no legal objections. Also that in so far as the president deems the company to have been pledged for the resumption of any portion of the scrip in bonds now on hand, he is authorized to take up and cancel such scrip in fulfillment of any such implied obligation." At a meeting of the directors holden July 31, 1878, so much of the last named vote as "authorized the issue of twenty year bonds in exchange for dividend scrip" was rescinded and no action ever taken under it.

The referee found:

"All the votes of the stockholders and directors were duly spread upon the records of the company; but it did not appear that the plaintiff ever knew of but one of them, that of the stockholders in January, 1874. The plaintiff received scrip certificates as they were issued from time to time on the preferred stock owned by him and they have all been converted into the eight per cent. first mortgage bonds. A large proportion of the scrip certificates so issued have been so converted, amounting to over \$1,000,000. In such conversions no distinction or difference has been observed between Nos. 6 and 7 and the earlier Nos. Nos. 6 and 7 have been converted into the bonds as readily as the earlier Nos. Considerable of this scrip was sold in the market, and was purchased by the president, treasurer, and some of the directors.

"The president received about \$19,000 of such scrip certificates on preferred stock which he owned, and purchased quite a large amount of the same in the market, and had most of it converted into eight per cent. first mortgage bonds, and the balance of a few thousand dollars have recently been converted into the new five per cent. bonds.

"The scrip so purchased in market was converted by the company into the eight per cent. first mortgage bonds for the purchaser as readily as it was to the holders of the preferred stock to whom the scrip certificates thereon were issued. The plaintiff purchased quite a large amount of said scrip certificates in the market, and the company through its president and treasurer converted \$10,000 of it into eight per cent. 1st mortgage bonds in the summer of 1877."

"January 5, 1877, the plaintiff's attorney for and in behalf of

the plaintiff took all the scrip certificates to the defendant's office in Rutland and there demanded of John B. Page the president, and J. M. Haven, the treasurer of the defendant, the before mentioned eight per cent. first mortgage bonds in exchange for said scrip and accrued interest. Both said Page and Haven declined so to convert them at that time, saying that the defendant had none of the first mortgage eight per cent. bonds on hand except such as were pledged as collateral security for the payment of some part of the defendant's floating debt, or such as it was necessary to use immediately for that purpose in renewal of such debt, but not always to the same party, but that they would so convert them in a short time and as soon as some of such bonds should be relieved from such pledge. He then demanded the money on said certificates and accrued interest. This they both peremptorily refused to pay."

"On July 15th, 1877, the plaintiff by his attorney repeated his former demand, except calling for the seven per cent. income bond in exchange for the certificates dated February 1st, 1872, to said Page and Haven.

"Said Page said he would convert the first four numbers in a few days, but could not at that time, for the reason before stated when demand was made. Said Haven said he would convert the first three numbers in a short time. Both declined to convert all the numbers later than those specified. The said attorney then demanded payment of all said certificates in money, which was absolutely refused."

"As appears from some of the votes of the defendant's directors before recited, and from other testimony, I find that said Page had the general direction of the conversion of scrip certificates into bonds."

"Said Page uniformly promised to make such conversion as soon as the bonds, eight per cent. first mortgage, could be redeemed from pledge for the company's floating debt, and said it would be in a short time. The exact dates of these interviews were not given, but I conclude they were subsequent to the passage of the vote of the directors heretofore recited, dated July 28, 1874, and I so find. Prior to that period all such certificates presented for conversion were converted into the eight per cent. first mortgage bonds. It did not appear that the company had ever converted any of such certificates into any other of the company's bonds except recently into five per cent. bonds."

"At intervals between the calls of the plaintiff, the company has had on hand, and used such bonds in taking up such certificates for other parties, and among others the president, said

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Page, and some of the directors, had quite an amount of such certificates converted into such bonds. During such intervals, and about the summer of 1877, but exactly when did not appear, the plaintiff had \$10,000 of such scrip certificates, mostly of the last number or those which did not have the convertibility clause upon their face, converted into such bonds."

"I find said Page told the plaintiff that the last two numbers, which contain no clause in regard to their convertibility, were convertible the same as those which contained such clause, and showed him the stockholders' vote of 1874. I find the company and its directors have so treated them, under the vote of the stockholders in Jan., 1874."

"The annual reports to the stockholders for the years 1871, 1872, 1873, 1874, 1875, 1876, 1877 and 1878, as published and circulated, either in pamphlet or in the Rutland Herald, were put in evidence and the statements therein contained in regard to the financial condition of the defendant were conceded to be correct. These reports generally came to the knowledge of the plaintiff, and may be referred to as a part of this report."

"At the annual meeting of the stockholders holden July 31st, 1878, a mortgage of its entire property was authorized to the New England Trust Company to secure the payment of \$1,500,000 twenty year bonds or notes of the defendant, bearing five per cent. interest, \$1,000,000 of which was to be used to take up the equipment bonds maturing in 1880, and the balance to fund any of the other indebtedness of the company, including the outstanding scrip dividends or certificates. Such mortgage and bonds were issued, dated August 1, 1878. The mortgage was put in evidence, and may be referred to as a part of this report. It recites the vote which authorized it. Nearly \$900,000 of the seven and eight per cent. equipment bonds have been exchanged for these new five per cent. bonds; as well as quite an amount of the outstanding scrip certificates, so that only about \$70,000 of such certificates are now outstanding. The company are ready to convert the plaintiff's certificates at their par value and accrued interest into these new five per cent. bonds."

"The defendant claimed that it had never had income or earnings out of which a dividend could properly have been made at the time when any of said scrip certificates were issued, and for that reason said certificates were issued without authority and without consideration, and are not binding on the defendant. Whether it had income or earnings applicable to such purpose depends on the facts aforesaid. I find that the defendant has uniformly treated the scrip certificates as an obligation binding on

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the defendant; and the referee is of the opinion that they are binding obligations of the defendant, but, whether due at the time this suit was commenced, or collectible in this form of action, is submitted to the court."

The other facts are stated in the opinion of the court.

James C. Barrett and J. Barrett, for the plaintiff.

The common courts are appropriate. *Reed v. Sturtevant*, 40 Vt. 521; *Crandall v. Bradley*, 7 Wend. 312; *Hennings v. Rothschild*, 4 Bing. 315 (13 E. C. L. 448); 2 Johns. 235; *Perry v. Smith*, 22 Vt. 301. Action sustainable in name of the "holder." *Hodges v. Shaler*, 22 N. Y. 114; *Hotchkiss v. Banks*, 21 Wall. 354; 1 Dan. Nego. Inst. s. 59; *Capron v. Capron*, 44 Vt. 410; *Hennings v. Rothschild*, *supra*. Consideration in the certificates sufficient. *Stevens v. The South Devon R. R. Co.*, 9 Hare, 313; *Browne v. Monmouthshire R. R. & Canal Co.*, 13 Beav. 32; *Moore v. Hudson R. R. Co.*, 12 Barb. 156, 160; 2 Redf. Railways, s. 211; *Cross v. Richardson*, 30 Vt. 641; *Wilson v. Wilson*, 32 Barb. 328. Import of the certificates. They fall within the general power of the corporation to borrow money and execute instruments in evidence thereof. *Angell & Ames Corp.* s. 257; *Field Corp.* s. 271; *Jones R. R. Secu.* s. 306; 1 Dan. Nego. Inst. ss. 381-6. The certificates have been ratified. Defendant estopped from denying their validity. *Field Corp.* s. 208, n.; *Bissell v. The Mich. etc. R. R. Co.*, 22 N. Y. 258; *Kent v. Quicksilver M. Co.*, 78 N. Y. 184-9.

A corporation after having declared a dividend and paid it to the other stockholders, cannot defend against a suit to recover the same by one stockholder, on the ground that the dividend has not been earned. *Stoddard v. Shetucket Co.*, 34 Conn. 542; 2 Redf. Railways, s. 240, n. The plaintiff not chargeable with knowledge. *Angell & Ames Corp.*, p. 400; *Field Corp.*, s. 73. The nature and rights of the "preferred or guaranteed stock" are defined by the defendant's charter. The charter is the law. As to "preferred stock" and "dividend" meaning indebtedness, payment, security, see *Burt v. Rattle*, 31 Ohio St. 116; *R. R. Co. v. Jackson*, 77 Pa. St. 321-5; 8 Mich. 100; 11 Rep. 691;

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13 Ib. 475; *Bates v. Androscoggin R. R.*, 49 Me. 491; *R. & B. R. R. Co. v. Thrall*, 35 Vt. 545; *R. R. Co. v. Maine*, 6 Otto. 511; *Tomlinson v. Jessup*, 15 Wall. 459; Cooley Con. Lim. (4th Ed.) p. 340, n.; *Hyatt v. McMahon*, 25 Barb. 457; 13 Gray, 239; 23 Pick. 340.

Prout & Walker, for the defendant.

No recovery on the common counts. 2 Greenl. Ev. s. 111; Alb. Tr. Ev. 277, 457; *Royce v. Nye*, 52 Vt. 372; *Vaughn v. Rugg*, Ib. 235. Refusing to exchange the certificates did not convert the plaintiff's claim into a money obligation. *Scott v. Montague*, 16 Vt. 164; *Rice v. Adams*, 32 Vt. 691; *Hale v. Fish*, 48 Vt. 227. Certificates not negotiable; hence, the "holder" cannot recover under the common counts. *Wainwright v. Straw*, 15 Vt. 215; *Smilie v. Stevens*, 41 Vt. 321; Story Pro. N. ss. 17, 18; *Farquhar v. Ins. Co.*, 6 Rep. 676; *Bank v. Green*, 13 Rep. 625; *Merriwether v. Saline Co.*, 5 Dillon, 265; Byles' Bills, 160, 164; *R. R. Co. v. Howard*, 7 Wall. 396; *Way v. Smith*, 111 Mass. 523, 187; 11 Gray, 170. Defendant had no right to exchange its mortgage bonds for the certificates. Wade Retroactive Laws, s. 71. Plaintiff affected with notice. *Green v. Bank*, 1 Thompson's Bank Cas. 497; *Chaffee v. R. R. Co.*, 53 Vt. 352; *People v. Batchellor*, 22 N. Y. 128. The funds must be applied as provided for by charter. *Munt v. Shrewsbury R. R. Co.*, 3 Eng. L. & Eq. R. 149; *McGregor v. The Deal & Dover R. R. Co.*, 16 L. & Eq. 180; 21 How. 441; *Horton v. Thompson*, 71 N. Y. 513; 14 L. R. Eq. 322; 2 Abf. Dig. L. Corp. 77, s. 55. Preferred or guaranteed stock not entitled to dividends until all debts of defendant are paid. Field Corp. s. 121; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Williston v. Mich. R. R.*, 13 Allen, 400; *Taft v. Hartford R. R. Co.*, 8 R. I. 310; 1 Dillon, 174; *St. John v. Erie R. R. Co.*, 10 Blach. 271; 4 Am. Corp. Cas. 92; *McGregor v. Home Ins. Co.* 6 Stewart (N. J.) 181; *Henry v. The Great N. R. R. Co.*, 58 Eng. Ch. R. 605; *Boardman v. L. S. & S. Mich. R. R. Co.*, 84 N. Y. 157; Green's Brice, 147, n.; 1 Potter L. Corp. 329; 2 Redf. Railways, 529, 240, 544; Jones' R. R. Securities, s. 623; Boone Corp. 125; Field Corp.

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ss. 104, 172; 33 Conn. 457; 72 N. Y. 207. It is a breach of trust and fraud to declare a dividend where no profits have been made. 1 Redf. Railways, 153; *Burnes v. Pennell*, 2 H. L. Cas. 496; Bigelow Frauds, 151; *Mann v. Cook*, 20 Conn. 217; 2 Redf. Railways, 537; 3 Keyes, 521. The stock and property a trust fund to pay the debts. *Nat. Trust Co. v. Miller*, 6 Stewart (N. Y.) 163; *R. R. Co. v. Howard*, 7 Wall. 409; *Bartlett v. Drew*, 57 N. Y. 587; 3 Mason, 311; Field Corp. s. 143; *Upton v. Tribilcock*, 91 U. S. 47; 2 Black. 721; 1 McCrary, 86; *Richardson v. R. R. Co.*, 44 Vt. 622; 22 Wall. 136; 10 Blatch. 271-9; *Evans v. Coventry*, 8 De G. M. & G. 835. Ratification. Doing a thing prohibited not a ratification of it. Story Agency, 115; 9 Exchequer, 55; 43 N. H. 516; 7 Conn. 93; 22 Conn. 501; *Pearce v. M. & I. R. R. Co.*, 21 How. 442; 5 Denio. 567; 41 N. Y. 35; 3 Cow. 623; Pierce Railroads, 34; Angell & Ames Corp. 309; 1 Seld. 320. No estoppel. 2 Redf. Railways, s. 236; *Chase v. Vanderbilt*, 62 N. Y. 307; Bigelow Estop. 438, 515, 263; 19 Wall. 146, 160; 38 Barb. 534; 34 N. Y. 30; Herman Estop. 510; Boone Corp. 104; 9 R. I. 366; 11 Wend. 18; 8 Cow. 543; Field Corp. s. 264.

The opinion of the court was delivered by

VEAZEY, J. The Rutland & Burlington R. R. Co. had two mortgages resting upon its property, and the road was in possession of, and being operated by, the trustees of the second mortgage bondholders. The trustees of the first mortgage bondholders had brought suit to foreclose that mortgage. While this suit was pending the bondholders under the second mortgage obtained an act of incorporation under the name of the Rutland R. R. Co., for the purpose of "holding, maintaining and operating" said R. & B. Railroad, and in July of that year, 1867, the company was organized. Under the authority of the eighth and ninth sections of the charter and for the purpose therein named; and under the circumstances detailed in the referee's report, the defendant by corporate vote, issued prior to February, 1872, "preferred or guaranteed stock, commonly called preferred guaranteed stock," to the amount of \$4,300,000. The company had also issued com-

mon stock to the amount of \$2,500,000. February 1, 1872, the company made its first issue of certificates of "scrip dividend," specified therein as being "in settlement of dividends on the preferred guaranteed stock." Thereafter from time to time the company continued to issue similar certificates, but varying somewhat in their terms. The plaintiff having become the owner and holder of such certificates of different issues to an amount of over \$21,000, and having demanded an exchange into the bonds of the company referred to in the certificates, and the company having refused to make the exchange, and then having demanded payment and been refused, brought this suit declaring in the common counts in assumpsit, to recover the amount of his certificates. ✓

The plaintiff was a preferred stockholder from June 4, 1872, to October 9, 1877, and during this time purchased the certificates in suit and others, and had issued to him certificates on his own stock. The referee gives a statement of the floating debt of the defendant at yearly and half yearly intervals, beginning August 1st, 1868, and ending August 1st, 1879, and says these were the balances of the bills payable as shown by the treasurer's books at the several dates named, which both parties treated as a fair representation of the floating debt of the defendant.

The referee finds that if the floating debt and current expenses were to be first paid out of rent or income, the defendant has had no funds with which to pay the plaintiff's certificates, and had none at the time the demands were made and this suit brought. If the preferred stock was entitled to be paid dividends before the floating debt was paid, the income of the company at the time of the demands had been sufficient to pay all such certificates issued by the defendant. The road was leased before the certificates were issued and its sole income was from rents.

The defendant claimed before the referee and now insists that it never had income or earnings out of which a dividend could properly be made at the time when any of the scrip certificates were issued, and that the certificates were issued without authority and without consideration and are not binding on the defendant.

I. A primary question on the facts reported is: Which has the

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first right to the income, the creditors of the defendant company, or the preferred stockholders? The provision of the charter, section 8, is, that the preferred or guaranteed stock shall be entitled to dividends from the earnings or income of the corporation before any other dividend shall be paid.

The construction of similar provisions has not unfrequently been involved in causes in this country and in England, and the struggle has been to gain for the preferred guaranteed stockholders the double advantage of a shareholder and creditor, but without success. The legislation in this State and elsewhere has been in accord with the idea developed in the reported cases, that the stock and property of a corporation is a trust fund pledged for the payment of its debts, and the creditors' right to payment and their lien is prior to the right of every stockholder. In the late case of *National Bank v. Douglass*, McCrary's Rep. vol. 1, p. 86, the court say "sacredly pledged," and quoting the language of Judge CLIFFORD in *R. R. Co. v. Howard*, 7 Wall. 392, adds that "stockholders are not entitled to any share of the capital stock nor any dividend of the profits until all the debts of the corporation are paid." To similar purport and equally strong is the language of Judge STORY in *Wood v. Dummer*, 3 Mason, 308; and again in *Mumma v. Potomac Co.*, 8 Pet. 286, and of Judge CURTIS in *Curran v. The State of Arkansas and Others*, 15 How. 304. See also the numerous cases in defendant's brief on this point.

✓ It is now well established that dividends on preferred stock are payable only out of net earnings which are applicable to the payment of dividends; *Pierce on Railroads*, p. 125, and cases cited in notes; and that such dividends are not payable absolutely and unconditionally as interest is, but only out of profits made by the company. The preference is limited to profits whenever earned. *Jones on Railroad Securities*, s. 620, and cases cited in notes; *Field on Corporation*, s. 121, and cases cited; *Corry v. Railroad Co.*, 29 Bevan, 263; *McGregor v. Ins. Co.*, 6 Stewart's Eq. Rep. (N. J.) 181; *St. John v. Erie R. R. Co.*, 10 Blatch. 271; s. c. 22 Wall, 186; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Taft v. R. R. Co.*, 8 R. I. 810.

Under the provision of this charter it is not a debt that is guaranteed, but the right to a dividend from the earnings and income of the corporation. The *right* to a dividend is not a debt. There is no debt until the dividend is declared. The obligation and right to declare it does not arise until there is a fund from which it can properly be made. See cases *supra*; also *In re London India Rubber Co.*, Law Rep. 5 Eq. Cases, 525.

In this case it could only be made from "earnings and income." The only earnings and income was the rental which was insufficient to pay the operating expenses and the floating debt. Upon the plaintiff's theory there was an unqualified obligation to declare and pay dividends to preferred stockholders from the earnings and income, notwithstanding there were debts of the company greater than the earnings and income. The creditor must come after the stockholder. Under this claim the rule universally recognized in the books that the property of a corporation is a trust fund pledged for the payment of the debts of the corporation, and the distinction everywhere upheld between a stockholder and creditors, would have to be disregarded. In our view the terms of the charter neither force nor import such construction.

II. But the learned counsel for the plaintiff deny that the preferred stock was *capital* stock, and insist that the only capital stock of the defendant company is the common stock, or the stock that was issued to the second mortgage bondholders, and that the intent and meaning of the charter in reference to the issue of preferred stock, was to provide means of exchanging the first mortgage bonds into a preferred stock, but not to affect the security, and that such was the understanding of all parties at the time, and that wherever preferred stockholders have been held to be *stockholders* in distinction from *creditors*, it has been upon the ground that by the terms of the act or contract their stock formed a part of the *capital* stock, and that they by taking the same become in reality and in substance, as well as in name, stockholders, holders of shares of *capital* stock.

It is true the charter was granted to the second bondholders, and provides that the capital stock, meaning undoubtedly the stock

to be obtained by the second mortgage bonds, should be 3,000,000 dollars, and in the provision, section 8, for issuing the preferred or guaranteed stock, it is not called capital stock. But the counsel nowhere intimate in their able brief wherein the preferred stock lacked any element or quality of the common stock. It seems to have had every privilege and recognition of the common stock in the meetings and administration of the company. The referee puts it in this way: "Besides the preferred stock the company had issued about \$2,500,000 of common stock, the holders of which were entitled to and did vote in the stockholders' meetings, having equal power in shaping and controlling the action of the company, with the holders of preferred stock to the same amount." The preferred stockholders had not only every privilege but were exempt from none of the liabilities of the common stockholders. If the eighth section of the charter had said preferred capital stock instead of preferred stock, what different quality would that have given the stock? The charter specifies the amount of the capital stock of the company, which was sufficient to cover the second mortgage bonds, but much less than the value of the road, the charter being granted to those bondholders, and it then provides for the issue of preferred stock, and limits that to the amount of prior claims or incumbrances.

The terms of this charter are plain to the intent of providing for two kinds of stock, viz.: common stock and preferred or guaranteed stock. It makes no distinction between them except to the effect that the preferred stock should receive dividends from the earnings and income of the corporation, at a rate and time named, with interest thereafter if not paid, "*before any other dividend shall be made therefrom.*" What is there in the charter to indicate that the legislature intended to simply create a creditor class in creating preferred stockholders, and meant *interest* by the word dividend? As stated by Jones on Railroad Secu. s. 619, "whatever rights attached to it [preferred stock] when issued continue to adhere to it." The peculiar right specified in the charter to be attached to it, is the right to a dividend before any should be made upon the common stock, and that it may be converted into common stock. In *St. John v. Erie R. R. Co.*,

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supra, Judge BLATCHFORD based his result upon a "fair and reasonable construction of the contract." Judge SWAYNE, in the same case in the Supreme Court, says: "The question presented in the present case depends for its solution *wholly* upon the construction given to the fifth clause of the agreement." The defendant's charter is the instrument to be construed here, and to borrow the words of Judge SWAYNE, "The language employed is apt to express the relation of stockholders. None to express the relation of creditors is found in the instrument." Under it "the preferred stockholders are entitled to have the full amount of their dividends paid before any payment is made in respect of dividends upon the ordinary stock." Jones, s. 620, and cases cited. In *Taft v. H. P. & F. R. R. Co.*, 8 R. I. 310, it was held that the word "guaranteed" in connection with preferred stock, did not change the legal effect of the rights of holders of such stock. BRADLEY, C. J., after referring to the English cases, says: "Without dwelling longer upon these and similar authorities, it is perfectly apparent that the guaranty of dividends by a railway company is considered by the courts and by the business community also, to mean nothing more than a pledge of the funds legally applicable to the purposes of a dividend; that, in short, it is a dividend and not a debt."

No claim is made in this case that the preferred shareholder does not have all the rights as a shareholder that is enjoyed by the holder of the common stock. The claim is that he is also a creditor with all the rights pertaining to that relation. Against this claim are the terms of the charter, the presumptions of law and the usual course of business. The evidence of his relation to the company is a certificate of stock which under the charter should, and probably does, guarantee a dividend to be paid to him before any dividend shall be paid on the common stock. Mr. Pierce, page 120, defines dividends to be corporate funds derived from the earnings of the corporation, and appropriated by a corporate act to be divided among the stockholders. A preferred dividend is the fund paid to one class of shareholders in priority to that to be paid to another class. See authorities cited by Pierce.

The case most relied upon by the plaintiff's counsel, where it was held that a holder of stock was a creditor, is that of *Burt v. Rattle*, reported in *The Reporter*, March 6, 1878, p. 310, (31 Ohio St. 116). The preferred stock in that case was issued under a statute that provided that the "holders of such preferred stock shall not have the right to vote on any question, at any meeting of the stockholders of such corporation, or for the election of officers, and shall not be liable for the debts of such corporation." And the corporation pursuant to a vote of the corporation secured the preferred stock then in suit by a bond and mortgage of the corporate property. WELCH, C. J., in delivering the opinion of the court says: "A majority of us think that the transaction between the corporation and the so-called preferred stockholders, was in fact and in law a loaning of money upon mortgage security and not the creation of additional members of the corporation. A man who advances his money to a corporation, and takes a bond and mortgage for its repayment, and also by express agreement between the parties takes no interest or risks in the concerns of the company, is a creditor of the company, and to call him a stockholder is a simple misnomer."

The distinction between that case and the one at bar is apparent. It is insisted that the provisions of the defendant's charter to the effect that the preferred stock should be issued only for the "purpose of satisfying, paying or purchasing prior claims, or incumbrances upon or interests in said road and property," and should be limited to the amount of such claims, and providing the rate of dividend, and for its payment semi-annually, and, "until declared," interest thereon to be added from the end of the half year when the same should be declared, and that no mortgage should take precedence of the preferred stock in the application of income, all show a purpose to create a preferred stock with all the security of a first mortgage, taken in connection with the fact that the prior claims consisted largely of the first mortgage then in process of foreclosure.

Courts have not favored the creation of different classes of shareholders with superior rights in one over others. Doubt is expressed in the books whether there is power in a corporation

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to distinguish between its stockholders by making them unequal in interest and right, except as it is expressly granted. Although some courts and law writers have said that the issue of preferred stock is but a method of borrowing money, and that preferred stock is only a form of mortgage, we think the law as now settled is better expressed by Pierce, who says, page 124: "The issue of preferred stock is a mode by which a corporation obtains funds for its enterprise, *without borrowing money or contracting a debt.*" The other view has been expressed generally in cases where the claim was that no dividend could properly be paid on preferred stock before and without paying on the other stock, as in *R. & B. R. R. Co. v. Thrall*, 35 Vt. 536; or where the preferred stockholders had no right in the management of the company, and were not liable for debts, and were nominal stockholders only, as in *Burt v. Rattle*, *supra*.

It was necessary for the defendant, consisting of the second mortgage bondholders, to raise money to pay up the first mortgage, in order to save the property from going on that mortgage. Two ways were open to them, one to borrow money, the other to sell stock. They decided to try the latter method. The pressure was severe upon them, and the amount to be raised was large. The stock in order to be sold must necessarily be carefully guarded. The issue of the preferred stock in this case was made as it usually is, that is, when the corporation has reached a crisis in its affairs, and the corporators are unwilling or unable to put more or sufficient money into the business, but are nevertheless disposed to give to those who will do so a preference in profits. Careful guards are, therefore, usually thrown around preferred stock in the charter or contract, as was done in this case; but this did not change the character of the transaction. It was still an obtaining of funds by sale of stock, and not a borrowing of money on a mortgage.

These provisions of the charter seem to us to point to a careful security of the benefit of the preference as between the two kinds of stock, but not a preference over the creditors of the corporation; not a preference with a perpetual promise to pay more than a legal rate of interest on the sum invested, out of the earnings,

without regard to what the corporation owes as a "floating debt," not a preference that would give to the holders of the preferred stock the character of corporators with the right to be the corporate managers, and also make them the preferred creditors of the corporation; not a preference under which the debts of the corporation might, and, as the company was situated, must go on increasing from year to year indefinitely unprovided for, while the stockholders and managers were receiving the whole income in dividends. We think the language of the charter well expresses what the report shows was the only object which the parties in interest needed or wanted to secure, so far as they then understood the situation, viz.: a preference in dividend between the two kinds of stock and nothing more. Under their preference the common stock can receive nothing until all the dividends on the preferred stock are paid according to the terms of the charter. *Pierce on Railroads*, page 125, and cases cited in notes.

It follows from this construction of the charter that the earnings of the defendant corporation should have been appropriated to the payment of its floating debt, in preference to the payment of dividends on preferred stock.

III. It appears from the report that until early in the year 1872, the financial condition of the company had not been fully understood, and that a very large floating indebtedness then first came to light. In this emergency the company began the issue of scrip dividend certificates. The first certificates were dated February 1st, 1872, and they were issued every six months thereafter until February 1st, 1875.

The plaintiff claims that even if the company had no profits out of which to pay dividends, and therefore ought not to have made or paid them, yet it is estopped from denying the validity of these certificates as obligations of the company by reason of its conduct in regard to them.

The defendant claims that they are incapable of ratification; that they are absolutely void because issued without right; that being issued when the company had no money applicable to dividends it was an unauthorized, illegal act, which affected the cer-

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tificates the same as though prohibited in the charter.

There was no lack of authority to make dividends to preferred stockholders. The charter provided for it. The company's action in regard to dividends was unseasonable, that is before it had funds applicable. Did such unseasonable exercise of power render the certificates void? The question is not what might have been the right of creditor or stockholders had they interposed. But *must* the court say in behalf of the *company only*, that its premature exercise of charter power was void because premature? We think not. In *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542, it was held in an action against the corporation by a stockholder, to recover a dividend declared by the directors, if all the other stockholders have received and retain their dividends, the corporation cannot set up in defence, that the dividend has not been earned, and that its payment would withdraw a part of the capital. *Kent v. Quick-silver Mining Co.*, 78 N. Y. 186. "If the power to make the contract exists, an excess in some particulars is not a defence." *Pierce*, 518, and cases there cited. In *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 378, BLACKBURN, J., says: "I think it very unfortunate that the same phrase of *Ultra Vires* has been used to express both an excess of authority as against the shareholders, and the doing of an act illegal as being *malum prohibitum*; for the two things are substantially different; and I think the use of the same phrase for both has produced confusion."

It is ordinarily a matter of internal management, to be determined by the company or the directors, when to declare dividends and the amount. This is subject to limitations, and equity will interfere either to enforce or restrain a dividend upon sufficient showing. Green's Brice, *Ultra Vires*, 2 Am. Ed. p. 202, and cases cited.

But equity even would not interfere with a dividend unless it appeared that somebody in particular was hurt or liable to be injured. It would not interfere after all danger had passed, and for the sake of vindicating general principles. *Stevens v. The South Devon R'y Co.*, 9 Hare, 813; reported also in XII. L. and Eq. 229; *Browne v. The Monmouthshire R'y & Canal Co.*, 13 Beav.

32; reported also in IV Eng. L. and Eq. 113; *Moore v. Hudson R. R. Co.*, 12 Barb. 156, 160; 2 Redf. on Railways, s. 211.

IV. These certificates being susceptible of ratification, should the defendant be estopped from denying their validity in this case? All these issues of certificates were authorized by nearly if not entirely unanimous votes of the corporation, followed by votes of the directors. The first vote was as follows:

“*Resolved*, That the directors be authorized and are hereby instructed to prepare and issue to the holders of the preferred stock, a scrip dividend of three and a half per cent., to date February 1st, 1872, upon forty three thousand shares of preferred stock.” The next vote was, “to pay further dividends on the preferred stock of the company by issuing to the holders thereof scrip (dividends) therefor as the same may become due.” Other votes followed from time to time. Every vote of the company and directors expressed or implied the idea of a payment of dividends. These certificates were all expressed to be “in settlement of dividends on the preferred guaranteed stock”; and were made convertible on demand or at the option of the holders, into mortgage bonds of the company, except the last two issues. The referee finds that the plaintiff received scrip certificates as they were issued from time to time on the preferred stock owned by him, and they have all been converted into bonds. Certificates have been so converted amounting to over \$1,000,000. In such conversions, no distinction or difference has been made between the two last issues, Nos. 6 and 7, and the earlier issues. Considerable of this scrip was sold in market and was purchased by the president, treasurer and some of the directors, and was converted into bonds. The scrip so purchased in market was converted by the company into bonds, for the purchaser as readily as it was for the holders of the preferred stock to whom the scrip certificates thereon were issued. This was done for the plaintiff to quite an extent down to about the time this suit was brought, July, 1878. The referee reports that the president had the general direction of the conversion of scrip certificates into bonds.

The president told the plaintiff that the last two issues, which contain no clause in regard to their convertibility, were convertible the same as those which contained such clause, and showed him the stockholders' vote to that effect. The referee finds the company and its directors so treated them, under that vote.

Some of the preferred stockholders, when they saw such clause was omitted from the scrip certificates, supposed they were not convertible into bonds and so sold them in market, and the plaintiff bought them at large discount, after he had been informed by the president that they were convertible into bonds, and was shown by him the said stockholders' vote to that effect; and he never knew until after this suit was brought, why the last two issues did not contain the convertible clause. Until after this suit was brought, neither the company nor any of its officers ever denied that these certificates were convertible into bonds, and the president and treasurer continued to make the conversions until after this suit was brought, though some of the later conversions were into a lower rate of interest bond, as shown in the report.

The referee does not find in terms that the plaintiff's certificates are the only ones not so converted; but he finds certificates have been so converted to an amount of over \$1,000,000; and it appears by computation that the total amount of certificates was about \$1,053,500. Therefore the fair conclusion from the report is that the plaintiff's certificates are substantially the only ones not converted.

It further appears that the floating debt of the company at the time this suit was brought had been very largely reduced, and it does not appear that the same treatment of these certificates with the other would have embarrassed the company, or that any creditor objected to the conversion.

The above is but a summary of what the report more fully shows that the company did in respect to the dividend certificates, and after stating the facts, the referee finds "that the defendant has uniformly treated the scrip certificates as an obligation binding on the defendant."

On the other hand the plaintiff was a stockholder, and so far as affected by constructive notice is entitled to stand no better as to

the certificates purchased by him than he would be as to certificates issued to him on his own stock. As a stockholder he cannot escape the responsibility pertaining to that relation for the wrongful policy of the company as to dividends. But it was only the financial condition of the company that rendered the policy wrongful. Can it be said that a stockholder is necessarily chargeable with notice that the affairs of a corporation are in such condition that they ought not to make a dividend? The propriety of making a dividend at a particular time is a matter to be determined upon consideration of all the circumstances; and these are not usually known by the stockholders. If a dividend is voted unwisely and without strict right at the time on account of no funds, the law would afford a remedy in behalf of an injured party. But may the *company itself*, after having so voted and paid every stockholder except the plaintiff, no one ever objecting, and after having treated the transaction as valid throughout, and after all danger from the wrongful policy has passed, say to the last beneficiary of the dividend, the act of voting and paying these dividends in scrip form was unlawful, and you, being a stockholder, thereby participated, and are, therefore, not entitled to the benefit that every other stockholder has enjoyed? It does not appear that the plaintiff had knowledge, or suspicion in fact, that the company, its officers, or its stockholders, designed or transacted anything unlawful or wrong towards any parties or interests in voting to pay dividends in scrip, or in paying the scrip by exchange into bonds, as was done down to the time payment was refused to himself. He had no part, in fact, in what was done by the company. The company decided the question of dividends for itself. It, and all its agents, officers and stockholders, have concurred in all that has been voted and transacted, and have taken the fruits thereof to themselves as matter of lawful right, and by no vote or act have any of said parties denied the validity and good faith of what has been done, until the defence in this suit was asserted.

After this suit was brought the stockholders voted to issue five per cent. bonds, secured by mortgage, "to fund the indebtedness of the company, including the outstanding scrip dividends or certificates," and used them for that purpose. The company has

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more than a million dollars bonded debt created by taking up these certificates, and has devoted its earnings and income to pay the interest on it; and the preferred stockholders have received this benefit. The effect of excluding the plaintiff as to his certificates would be to divide the amount among the preferred stockholders who have already enjoyed the benefit he now claims. We think, upon the facts stated in the report, the company cannot in this suit assert as a defense its wrongful administration. The plaintiff stands in no such equal fault as to warrant a denial of remedy. *Harrington v. Grant*, 54 Vt. 236, and cases there cited.

V. The defense of alleged want of consideration in the certificates is not available.

The right to dividends, seven per cent., existed under the charter when there should be funds applicable. As before shown, this is a continuing right. The company issued the certificates in settlement. The shareholder took them in settlement. The votes were in effect to pay the dividends in this form. The certificates were taken, and the right to a dividend in any other form surrendered. They were taken in settlement of a claim made by the shareholders, and recognized as valid by the company, and authorized by the terms of the charter. There would be no question but that this would constitute a good consideration if the financial condition of the company had warranted a dividend. *Hayward v. Pilgrim Soc.*, 21 Pick. 276; *Blake v. Peck*, 11 Vt. 483; *Cross v. Richardson*, 30 Vt. 641; *Miller v. Emans*, 19 N. Y. 384; *Plank Road Co. v. Payne*, 17 Barb. 567.

The company having obtained the surrender in the exercise of a power existing under the charter, and having always treated the certificates as resting upon the same consideration as though given in surrender of a dividend actually earned and warranted, cannot, under the facts disclosed, be heard to say that the certificate holders surrendered nothing.

VI. The defendant's counsel make the point and support it by strong argument and great array of authority, that the company

had no right to exchange its mortgage bonds for these dividend certificates; that the bonds were authorized and issued for a particular purpose,—a purpose or object expressed in the statute, in the acts in amendment of the defendant's charter, in the resolution of the corporation, and in the eight per cent. mortgage itself.

It is plain that the company had no better right to appropriate its bonds to the payment of a dividend not strictly earned than it had to pay in money. There was no absolute right to a dividend in any form before debts were paid. Neither is it clear that the amended charter and the mortgage issued thereunder should be construed as authorizing the exchange of the bonds for these certificates. We make no further expression upon these points, because what has been said upon the subject of ratification and estoppel applies as well here. The stockholders themselves in corporate action have given construction to the act and the mortgage, until they have been benefitted under that construction to the amount of a million dollars and more. It is now too late, under the facts reported, for the company to ask for a different, though perhaps better construction, as against the last holder of its obligations of this character.

VII. These certificates, except the first issues, were made payable at the option of the company, but convertible into bonds at the option of the holder. They were all issued from 1872 to 1875 inclusive, and demand made for bonds and suit brought in 1878. As to certificates promising to pay a specified sum with interest, in bonds, on demand, Jones (*R. R. Securities*, s. 19) says: "if the corporation does not on demand exercise its election to make payment in bonds, the creditor may recover the amount in money; payment in bonds being a privilege for the benefit of the corporation; but if this privilege be not taken advantage of at the proper time, the rule of damages is the principal sum and interest." These certificates are different, but whatever would be the proper construction of them independently, we think the facts of this case bring them within the rule established as to certificates payable in bonds on demand, and this applies to the first issue.

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The declaration was in general assumpsit, but the stipulation provides that special counts may be filed. Formerly, especially in England, whenever there was an express or special promise, all implied assumpsits were merged and superseded, and could never after be resorted to. But this rule has been deviated from, especially in this State. If goods have been sold, work done or money passed, whatever may have been the agreement as to price, or mode, or time of payment, if the terms have transpired so that money has become due, the general count is sufficient. But when the contract is executory and subsisting, and the action is for the breach, for the recovery of damages, then the declaration must be special. *Way v. Wakefield*, 7 Vt. 223. It is settled law in this State that the general counts are sufficient for the recovery on a promissory note payable in specified articles, when payment is not made at the time named. Upon failure to pay as agreed, the note is considered as an obligation for the payment of money alone. *Perry v. Smith*, 22 Vt. 301. This rule was applied in a case of general assumpsit, where the stipulation was to accept a portion of the price of the work in the stock of the defendant company, which was worth only 83 per cent. at the time the work was finished. The court say: "The stock of a corporation is but a certificate of such a sum being due the bearer. And where the party stipulates to pay in his own paper, if he refuse, suit may be brought immediately, although the paper was to have been on time, if given. But it was never supposed the party could reduce the money by showing his paper depreciated in the market. This would be virtually giving the difference to the other stockholders. *Barker et al. v. T. & H. R. R. Co.*, 27 Vt. 766; see also *Wainwright v. Straw*, 15 Vt. 219; *Read v. Sturtevant*, 40 Vt. 521; *Bradley v. Phillips*, 52 Vt. 517. Under the decisions in this State we hold the common counts were sufficient.

VIII. It is claimed these certificates are not negotiable instruments, hence the plaintiff cannot recover in his own name. They run to the "holder," went on the market, and have always been treated by the defendant as entitling the subsequent holder to the same rights as though payable to bearer. Such has always

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been the treatment accorded the plaintiff. The remarks of the court in *Hennings v. Rothschild*, 4 Bing. 315 (13 En. Com. L., 448), are pertinent: "We do not say whether the receipts were transferable or not. The ground upon which we put the plaintiff's right to recover in this case, is this, that whether the original receipts were transferrable or not, the defendant has treated the plaintiff as the person holding these receipts, and has undertaken to consider him as the person who originally subscribed the money." So in this case, as these certificates are worded and have been treated, we do not think the plaintiff's right of recovery depends on their negotiability, but, whether strictly negotiable or not, which has not been considered, we think he may stand on them as though he were the original holder. The plaintiff holds by purchase and payment, in his own right, without wrong to the company, the obligation of the company directly to himself as holder. The terms of the paper imply that it was to be used, recognized and treated, as it has been by the company and third parties, and it should now receive the same recognition by the court. Upon the facts found there would be strong ground for putting the case, if necessary, upon the principle stated in *Moar v. Wright*, 1 Vt. 57; *Bucklin v. Ward*, 7 Vt. 195; and *Hodges v. Eastman*, 12 Vt. 358; in all of which it was held that if the maker of a note expressly promises to pay his note to the holder, the holder might sue on such promise in his own name, though he could not sue on the note by reason of its not being negotiable, or not being legally transferred to him.

IX. The Cheshire Railroad Company, one of the trustees named in writ, is a foreign corporation. The defendant claims it cannot be held chargeable, *first*, because the process does not allege that this corporation is operating any railroad or doing any business in this State, or was under any liability in consequence of any debt due or owing in this State, and insists that such jurisdictional fact is necessary to be alleged in the process. The process alleges that the Cheshire Company "has an authorized agent resident within the State of Vermont at Bellows Falls, in the town of Rockingham and the County of Windham and said State of

Vermont." Such allegation is sufficient to give the court jurisdiction when service has been made according to the statute. The question whether chargeable follows on disclosure or default. The disclosure filed would make the Cheshire Company chargeable. The defendant filed allegations, charging that the fund to be paid monthly by that company to the defendant had been assigned by the defendant for valuable consideration to one Williams, and that the Cheshire Company had promised to pay it to him. The difficulty with this defence is, that it stands on mere allegation without any proof. Neither does the referee's report, which was agreed to be treated as a commissioner's report in the trustee branch of the case, contain any finding upon this allegation. The liability is left to stand upon the disclosure and the report, and, so far as these show, both trustees are chargeable.

The defendant filed allegations, claiming for reasons therein stated that the Central Vermont Railroad Company should not be held or adjudged chargeable as trustee. The reasons assigned pertain *not* to any question between the trustee and the defendant (except the assignment to Williams), but to the right of the plaintiff to recover of the defendant. The statute, Gen. Sts., c. 34, s. 16, R. L., s. 1094, provides that either party may allege and prove any facts that may be material in deciding whether the alleged trustee is chargeable. This does not refer to the issues between the principal parties, but to questions as to the liability of the alleged trustee. There being no such question in this case, as it stands on the disclosure and report, said allegations should be dismissed.

The *pro forma* judgment of the County Court is reversed, and judgment for the plaintiff to recover the amount of his scrip dividend certificates with interest as found by the referee, with interest thereon, and both the Central Vermont Railroad Company and the Cheshire Railroad Company are adjudged chargeable as trustees.

C. N. MOSLEY v. VERMONT MUTUAL FIRE INSURANCE COMPANY.

Fire Insurance. Waiver. Policy construed, liberally in respect to Insured, strictly in respect to Company. Fraud.

1. It is well settled, that if a party insured calls upon the insurer to pay his loss, and the latter makes no specific objection to the form or sufficiency of such proofs of loss as are offered, or to the entire neglect to furnish such proofs, *in season* for the claimant to repair his error, but declines to pay the claim upon other grounds, he will be *estopped* from setting up defects in the proof of loss as a defense to the claim, being presumed to have *waived* them; or, the most that the insurer can claim is, that the *question of waiver* may go to the jury.
2. Policies are construed liberally in respect to the insured, strictly in respect to the company; thus, where the subject of insurance was *only* "goods and groceries," and there was a clause in the policy, that the keeping of gunpowder for sale or on storage "upon or in the *premises* insured," the court held that the meaning of the word, "*premises*," as used in the policy was "lands and tenements"; that it did not include "goods and groceries"; and, therefore, if gunpowder had been kept on "*premises*" not insured, it would not vitiate the policy.
3. So, where the same policy contained this clause: "no camphene, burning fluid," &c., . . . "or any other inflammable liquid" . . . "shall be kept for sale in any building hereafter insured in this company," and it was claimed that the plaintiff kept "gin" and "turpentine," the court held it would not take judicial notice that "gin" and "turpentine" were "inflammable liquids"; that it was a question of fact for the jury; and gave the same construction to the word, "*building*," as to the word, "*premises*" in its effect upon the policy.
4. *Misrepresentation must be material to the risk.* If there is not a stipulation in plain and unambiguous terms in the insurance contract that any misrepresentation of fact, no matter how immaterial, shall render it void, the rule is, that it must be something *material to the risk*; thus, when the policy included clothing in a store, and the court charged that if the insured "mistated the quantity or value of any of the *kinds* of these goods,—as the number of overcoats or other articles,—either through mistake or otherwise, it would not vitiate the policy, provided he stated correctly the value of the whole, and all were insurable in the same class and at the same rates"; *it was held*, no error.
5. *Fraud in making proof of loss.* If the insured in good faith and as accurately and fully as he could stated his loss, a mistake in some particulars would not be fraud.
6. *Proof in support of character.* In an action on a policy of insurance where the defendant's evidence tended to show that the plaintiff burned his own building, and that he had committed perjury in his proof of loss, evidence of the plaintiff's good character was admissible.
7. *Interest* was properly allowed from a date nearly two months after the loss.

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ASSUMPSIT upon two policies of insurance. Trial by jury, June Term, Addison County, 1881, PIERPOINT, Ch. J., presiding. Verdict for the plaintiff.

The facts are sufficiently stated in the opinion of the court.

Wilson & Hall, John W. Stewart and E. J. Ormsbee, for the defendant.

The contracts provide that *the keeping of gunpowder for sale or on storage upon or in the premises insured* without permission granted in the policies renders them void. No permission was granted or inserted in the policies.

It was conceded that he kept it in his store for sale and had sold it as he had call for it. This was in direct violation of the express terms of the contracts, and hence rendered the policies void. *Flanders Ins. p. 319*; *May Ins. s. 156*; *Campbell v. Charter Oak Ins. Co.*, 10 Allen, 213; *Faulkner v. Cent. Fire Ins. Co.*, 2 Bennett, 38; *Jennings v. Chenango Ins. Co.*, 2 Bennett, 487; *Powers v. N. E. Mutual Life Association*, 50 Vt. 634; *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4.

The court erred in the construction of this by-law, by holding that the words "*upon or in the premises insured*," referred to the building and had no application to the stock of goods in the building. The term *premises* relates to and means the stock of goods which was the only subject of said contract. *Burrills Law. Dict.*; *Hewton v. Ewbank*, 4 Camp. 89; *May Ins. s. 174*; 81 N. Y. p. 273.

Keeping gunpowder, turpentine and intoxicating liquor for sale materially enhanced the risk. These articles are not within any purpose for which plaintiff declared he used or occupied the store. *Pierce v. Empire Ins. Co.*, 62 Barb. 636; *Brink v. M. & M. Ins. Co.*, 49 Vt. 442.

If there was any doubt that keeping of gunpowder, turpentine and intoxicating liquor for sale with a stock of dry goods and groceries was material and increased the risk, the question should have been submitted to the jury. *Carrigan v. Lycoming Ins. Co.*, 53 Vt. 418; 20 N. H. 551; s. c. in 2 Bennett, 548.

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As to the effect of false representations made at the time the contract was made, see *May Ins.* (2d Ed.) ss. 181, 184; *Carpenter v. American Ins. Co.*, 1 Bennett, 762; *Valton v. Nat. Life Ins. Co.*, 20 N. Y. 32; *Burritt v. Saratoga Mut.*, 5 Hill, 188; *Clark v. Manufacturing Ins. Co.*, 8 How. 245; 1 *Phillips Ins.* ss. 529, 530, 541; *Farmers' Mutual v. Marshall*, 29 Vt. 23; *Kimball v. Aetna Ins. Co.*, 9 Allen, 554; *Campbell v. N. E. Mut. Life Ins.*, 98 Mass. 389.

Evidence of the plaintiff's character not admissible. 1 *Phil. Ev.* (5th Ed.) 637; *Dillaber v. Ins. Co.* 69 N. Y. 256; *Wright v. McKee*, 37 Vt. 161; *Schmidt v. N. Y. Ins. Co.*, 1 Gray, 529, 535; *Goff v. St. John*, 16 Wend. 646; *Fowler v. Aetna Fire Ins. Co.*, 1 Bennett, 179.

E. R. Hard and *H. Ballard*, for the plaintiff.

If the company based its refusal to pay the plaintiff's loss, alone, upon his alleged "misrepresentation, fraud and false swearing" in his proofs, it was a *waiver* of compliance with any of the requirements of the by-law; or if the defendant specified certain other deficiencies in the proof, all requirements of the by-law, not so specified, were waived, and to the extent of such waiver the plaintiff was legally excused from complying with the provisions of the by-law. *Wood Ins.* 716, 717, 730, note; *May Ins.* s. 468; *Franklin Fire I. Co. v. Updegraff*, 43 Pa. 350; *Noyes v. W. County Ins. Co.*, 30 Vt. 659; *Smith v. Am. Ins. Co.*, 34 Wis.; *Graves v. Wash. M. I. Co.*, 12 Allen 391; *Wood Ins.* 716, 718, 719; *McMaster v. W. C. M. I. Co.*, 25 Wend. 379; *Aetna Ins. Co. v. Tyler*, 16 Wend. 385. Forfeitures are not favored. *May Ins.* s. 174; *Wood Ins.* 177. The by-law against keeping gunpowder "upon or in the premises" is inapplicable to this case. *May Ins.* 245, 262; 4 *Bennett Ins. Cas.* 140; *Burrill v. Ch. Ins. Co.*, 1 *Edm. (N. Y.) Ins. Cas.* 238; *Moore v. Ins. Co.*, 29 Me. 97. The by-law respecting inflammable liquids applies only to the keeping, &c., in a *building insured*. *May Ins.* 245, 263; *Leggett v. Ins. Co.*, 4 *Bennett Ins. Cas.* 140. The keeping of such small quantities of gunpowder, &c., as was shown in this case would not vitiate the policy. *Carrigan v. Ins. Co.*, 53 Vt. 418;

Wood Ins. p. 840. It was competent for the jury to find the fact from their general knowledge that gunpowder was an article "usually kept". *Craver v. Hornberg*, 26 Kans.; 1 Gray, 592. Evidence of plaintiff's character was admissible. *State v. Roe*, 12 Vt. 98; *Sweet v. Sherman*, 21 Vt. 23.

The opinion of the court was delivered by

ROYCE, Ch. J. This was an action of assumpsit, declaring upon two policies of insurance issued by the defendant to the plaintiff. One of said policies is for \$800, expressed to be "on dry goods and groceries in building described in Bridport"; and the other, for \$1,600, "on goods in building described in Bridport." The policies have printed upon them, under the head of "extracts from the by-laws," certain conditions which are made a part of the contract of insurance, and among these "extracts" are the following:

"The keeping of gunpowder for sale or on storage, upon or in the premises insured, without a request in the application and express permission in the policy, shall render it void"; and, "No camphene, burning fluid, spirit, gas, or any other inflammable liquid [except kerosene] shall be kept for sale in any building hereafter insured in this company, without written permission; and in no case shall it be drawn for use by artificial light, without rendering the policy void"; also, "All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company, and within thirty days after said loss to deliver in a particular account in detail of such loss or damage, signed with their own hands, and verified by their oath or affirmation, and also, if required, their books of account and other proper vouchers. They shall also declare on oath whether any and what other insurance has been made on the same property, and whether they were the owners of the property at the time of the loss. If there be any misrepresentation, fraud, or false swearing, the claimant shall forfeit all claim by virtue of his policy."

The main questions raised here are based upon the requests to charge. The first of these, founded on the last quoted condition in the policy, was as follows:

"I. The plaintiff cannot recover in this action; because he has not shown compliance with the conditions of policies, and the acts of incorporation, by-laws and application, which constitute the

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contract. First, he did not, within thirty days after his loss, declare in writing signed by him and upon his oath that he had lost any goods by fire; second, that he was the owner or had any interest in the goods; third, whether any and what other insurance had been made on the goods."

Without going into the refinements of counsel upon this point, we deem it sufficient to say that this requirement, being for the benefit of the company, could be waived or modified by the company; and it is well settled, both upon principle and authority, that if a party insured calls upon the insurer to pay his loss, and the latter makes no specific objection to the form or sufficiency of such proofs of that loss as are offered, or, to the entire neglect to furnish such proofs, *in season* for the claimant to repair his error, but declines to pay the claim upon other and different grounds, specifying them, he will be estopped from thereafter setting up defects in the proof of loss as a defense to the claim being presumed to have waived them. Certainly the most that can be claimed by an insurer in such a case, is that the question may go to the jury, under proper instructions, as to whether there was in fact such a waiver. *Noyes v. Ins. Co.*, 30 Vt. 659; *Farmers, &c., Ins. Co. v. Meckes*, [Pa. 1881] 12 Rep. 314; *Palmer v. St. Paul, &c., Ins. Co.* [Wis. 1878,] 6 Ib. 413; *Goodwin v. Mass. &c., Ins. Co.*, 73 N. Y. 480; *Prentice v. Knickerbocker Life Ins. Co.*, 77 N. Y. 483; *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108; *Ætna Ins. Co. v. Tyler*, 16 Wend. 385; *McMaster v. Westchester Ins. Co.*, 25 Ib. 379; 6 Cush. 440; *Kernochan v. Bowery Ins. Co.*, 17 N. Y. 428; *Child v. The Sun Mut. Ins. Co.*, 3 Sand. 42; *Graham v. Firemen's Ins. Co.*, 21 Alb. L. J. 98; *Ins. Co. v. Stauffer*, 9 Casey, 397; *Ins. Co. v. Sennett*, 41 Pa. St. 161; *Coursin v. Ins. Co.*, 46 Ib. 323; *Buckley v. Garrett*, 47 Ib. 204; *Ins. Co. v. Taylor*, 23 P. F. S. 343; *Ins. Co. v. Todd*, 2 Norris, 272; *Crawford, &c., Ins. Co. v. Cochran*, [Pa. 1879,] 7 Rep. 758; *Harriman v. Queen Ins. Co.*, 49 Wis. 71; *Enterprise Ins. Co. v. Parisot*, 35 Ohio St. 35; *Home Ins. Co. v. Baltimore Warehouse Co.*, [U. S. Sup. Ct. 1877,] 16 Am. L. Reg. N. S. 162; *Norwich, &c., Trans. Co. v. Western Mass. Ins. Co.*, 6 Blatchf. 241; *Bennett v. Maryland Fire Ins. Co.*, [U. S. Dist.

Ct. N. D. N. Y. 1878,] 17 Alb. L. J. 363, and authorities cited in these.

In the case at bar there was evidence tending to show a more or less faulty compliance with the condition relating to proofs of loss, and evidence tending to show that no objection was made by the company, at least within the thirty days after the loss, to the form or sufficiency of these proofs; but, that the refusal of the company to pay, when brought to the knowledge of the plaintiff, was expressed to be upon other grounds. All this evidence was submitted to the jury by the learned Chief Justice with instructions in which we find no error; and the findings which the jury must have made, having legitimate evidence upon which to rest, and being vitiated by no error in the instructions of the court, cannot be disturbed.

The defendant's second request was that the court should charge the jury that "the plaintiff cannot recover because it appears from the evidence he furnished the defendant of his loss, and of his bills and books, that he kept on sale in said store, intoxicating liquor, turpentine, and gun-powder, which by the express terms of the contract rendered the policy void." The conditions in the policy upon which this request is founded have been quoted above. They are conditions of forfeiture, inserted for the benefit and protection of the insurer. Says COLT, J., in the recent case of *Turner v. Meriden Fire Ins. Co.*, U. S. C. Ct. Dist. of R. I. 22 Am. Law Reg. N. S. 275: "We believe the general rule, that conditions in insurance policies inserted for the benefit of the company should be strictly construed against it, to be a sound one"; and HUGHES, J., in *American Basket Co. v. Farmville Ins. Co.*, U. S. C. Ct. Dist. of Va. 8 Rep. 744, says, policies of insurance differ somewhat from other contracts in respect to the rules of construction to be applied to them. "They are unipartite. They are in the form of receipts from the insurers to the insured, embodying covenants to compensate for losses described. They are signed by the insurer only. In general the insured never sees the policy until after he contracts and pays his premium, and he then most frequently receives it from a distance, when it is too late for him to obtain explanations or modifications of the policy sent him. The

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policy, too, is generally filled with conditions inserted by persons skilled in the learning of the insurance law, and acting in the exclusive interest of the insurance company. Out of these circumstances the principle has grown up in the courts that these policies must be construed liberally in respect to the persons insured, and strictly with respect to the insurance company." See also *Ins. Co. v. Wilkinson*, 13 Wall. 232; *Willis v. Hanover, f.c., Ins. Co.*, 79 N. C. 285; *Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. 850, and authorities cited; also there marks of POWERS, J., in *Brink v. Merchants, f.c., Ins. Co.*, 49 Vt. 442, on page 457. The New York Court of Appeals, in passing upon the proposition that a clause in an insurance policy providing that the policy should become void "If the property shall hereafter become incumbered in any way" without consent of the company, covered the case of an incumbrance by way of a judgment in favor of a third person, say: "To so construe it would defeat the contract of insurance in cases which could not have been contemplated. The defendant is claiming a forfeiture. When a clause in a contract is capable of two constructions, one of which will support and the other defeat the principal obligation, the former will be preferred. Forfeitures are not favored; and the party claiming a forfeiture will not be permitted, upon equivocal or doubtful clauses or words contained in his own contract, to deprive the other party of the benefit of the right or indemnity for which he contracted." *Baley v. Homestead Fire Ins. Co.*, [N. Y. 1880,] 9 Rep. 578.

The language of the first forfeiture clause in the policy in this case is, that the keeping of gunpowder for sale or on storage "upon or in the premises insured" shall render it void. The subject of the insurance is "goods" in the one policy; "dry goods and groceries," in the other. We are not referred to, nor have we been able to find, any adjudged case, or other recognized legal authority, which gives to the word "premises," [except as used in conveyancing and the drafting of pleadings, &c.] any other legal definition than the one, time honored and generally understood, of "lands and tenements." Nothing is insured by the policies in this case that comes within that definition. In order to give the clause the construction contended for by the defendant

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as applicable to this case, we must add a new meaning to the word "premises," and say that it means not only "lands and tenements," but "dry goods and groceries." We must go even further than this, and alter the very words of the contract, because the context is inconsistent with such a definition of the word "premises," the prepositions both being inappropriate. The skilled draftsman who formulated these by-laws would scarcely have prohibited the keeping of gunpowder "upon or in the dry goods and groceries insured"; and we would therefore have to say that "upon or in" is equivalent to "among" or "in the same building with," which would be directly in the teeth of the great lexicographers, who tell us that the distinctive meaning of "upon" is "not under," and of "in" "not outside of." That the taking of such liberties with the language of a contract which is plain, unambiguous and apposite, each word having a perfectly well established and understood meaning, would be allowable under any circumstances is matter of grave doubt. In the present case it would be not only giving an exceedingly liberal construction to the language of the contract, but straining that language to, if not beyond, its utmost tension in favor of the *insurer* instead of the *insured*, which, in view of the well established rules and principles of the law, and the authorities above cited, as well as many others to the same effect, which might be referred to were cumulative authority necessary, we think would be wholly unjustifiable.

The other subdivisions of this request are founded upon the clause against "inflammable liquids" above quoted. It is claimed by the defendant that the case shows a keeping for sale by the plaintiff of certain small quantities of "turpentine" and "gin," while the plaintiff denies that this is established by the evidence. Without attempting to settle this controversy, it is sufficient to say that neither "turpentine" nor "gin" are referred to in the prohibition, unless they come within the general term, "other inflammable liquid." The burden is upon the insurer to show that they did come within this description if he would avoid liability by reason of their having been kept. We find nothing in the case to indicate that any evidence was adduced tending to show that

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the turpentine and gin referred to were "inflammable liquids." The defendant strenuously contends that the jury ought not to be permitted to draw upon their own knowledge of whether gunpowder is an "article usually kept in a country store," but should find the fact only upon evidence adduced before them. If this proposition is sound, *pari ratione* there was nothing to justify the jury in finding that turpentine and gin were "inflammable liquids." Indeed it has been expressly held by the Supreme Court of Pennsylvania that the court will not take judicial notice that benzine is of like nature with camphene or spirit gas in point of inflammability or explosiveness; but that it is a question of fact to be found by a jury "upon evidence." *Mears v. Humboldt Ins. Co.*, [Pa. 1879,] 21 Alb. L. J. 114. See also *Willis v. Hanover, &c., Ins. Co.*, 79 N. C. But by reference to the clause it will be seen that the keeping of inflammable liquids is prohibited only *in any building insured*. To construe "building" to mean "dry goods and groceries," or, add to the language of the contract so as to make it read, "in any building insured *or any building in which are goods insured*," would certainly be no more justifiable than to take the liberties suggested with the gunpowder clause. There was no error of which the defendant can complain, therefore, in the charge of the learned judge upon these points. As is said in the case of *Mears v. Humboldt Ins. Co.*, *supra*, it is to be presumed that if the company had intended these forfeiture conditions to apply to this risk, it would have so altered the language of the contract as to make them applicable, plainly and unambiguously, as could easily have been done. The plaintiff would then have had the meaning of the company plainly before him, and could have accepted or rejected the contract, understanding just what he had to expect.

The defendant's third and fourth requests were as follows :

"When the plaintiff applied to Grovenor, defendant's agent, for additional insurance, he was bound to state fairly and honestly in the application, the value of the goods he wanted insured, and to answer correctly and without misrepresentation, any inquiry of said agent, in respect to matters material to the risk; and if the plaintiff purposely or through negligence misrepresented his stock

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or its value he cannot recover. It is an implied condition of the contract of insurance, that it is free from misrepresentation or concealment, whether fraudulent or through mistake. The plaintiff cannot avoid the effect of any misrepresentation or concealment, because the agent had an opportunity to inspect the goods. If the jury find as defendant's evidence tends to show that the plaintiff represented to Grovenor, when he applied for the policy of \$800, that he had purchased \$1,000 of ready-made clothing, and four or five hundred dollars of dry goods, and put them in the store, and that it was untrue, the plaintiff cannot recover anything on the last policy."

The non-compliance with this request by the learned Chief Justice which is complained of as error, was, in substance, that he instructed the jury that if, when the plaintiff made application for the second policy and represented to the defendant's agent the amount and kind of goods he had on hand, upon which the additional insurance was desired, he misstated the quantity or value of any of the *kinds* of these goods—as the number of overcoats or other articles—either through mistake or otherwise, it would not vitiate the policy provided he stated correctly the value of the whole, and all were insurable in the same class and at the same rates. The charge was, in substance and effect, that the misrepresentation must be of something *material to the risk* in order to avoid the policy. It is undoubtedly competent for an insurance contract to be so drawn as that it shall become void if the applicant makes any misrepresentation of fact, no matter how immaterial, and if such is the plain language it will be enforced. *Boutelle v. Ins. Co.*, 51 Vt. 4. The policies in question contain no such stipulation with regard to the application itself, and certainly none with regard to oral representations which may be made to the agent at the time of making the application. In the absence of such stipulation in the policy, in plain and unambiguous terms, the rule is well settled as laid down in the charge, that such misrepresentations will not avoid the policy unless *material to the risk*. *Barreau v. Phoenix Ins. Co.*, [N. Y. 1876,] 3 L. & E. Rep. 803; *Lycoming Ins. Co. v. Ruben*, [Ill.] 1 Ib. 112; *Ryan v. Ins. Co.*, [Wis. 1879,] 20 Alb. L. J. 236.

With regard to the proofs of loss, the defendant requested the

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court to charge that: "If the jury find that plaintiff, in making his statement of loss to the defendant, or in his preliminary proof of said loss, was guilty of any fraud or false swearing, he cannot recover"; and, "if the jury find that in making his proof of loss, (if such it is) under the provisions of the policy of October 10th, 1879, the plaintiff has been guilty of any fraud, false swearing or misrepresentation, he is not entitled to recover thereunder." The court instructed the jury, in substance, that under these requirements in the policy they must find that the plaintiff in good faith, and as accurately and fully, as he could, to the best of his knowledge and belief, truly stated his loss; but, that if in such statement he might have made a *mistake* in some particulars, that would not come within the true meaning of the language of the contract. A more strict requirement than this would demand of human testimony and human accuracy more than they are capable of; and to hold that a man testifying in good faith and to the best of his knowledge and belief would be guilty of misrepresentation, fraud or false swearing, because, being human and fallible, he might be mistaken in his statement of some fact which he honestly believed to be as stated by him, would reverse the old maxim *lex non cogit ad impossibilia*, and probably render of no effect nine-tenths of the insurance policies in force throughout the country. *Hunchberger v. Ins. Co.*, 5 Biss. 106; *Sibley v. St. Paul &c., Ins. Co.*, [U. S. C. Ct. N. D. Ill. 1879,] 8 Rep. 808; *Mack v. Lancashire Ins. Co.*, [U. S. C. Ct. Mo. 1880,] 10 Ib. 800; *Farmers &c., Ins. Co. v. Meckes, supra*; *Dodge v. Ins. Co.*, [Wis. 1880,] 22 Alb. L. J. 118, and cases cited.

The requests to charge were numerous and minute; and with regard to those not covered by what has been said we deem it sufficient to say that from a careful examination of the charge we are satisfied they were complied with as far as the defendant was entitled to have them.

The defendant excepted to the admission of testimony offered by the plaintiff in support of his character for honesty, integrity and truthfulness. To determine the question of the admissibility of that evidence it is necessary to see how far the evidence which had been put in by the defendant had tended to impeach the char-

acter of the plaintiff in these particulars. That evidence tended to show not only that the plaintiff burned the building in which the insured goods were situate, but that he was guilty of perjury in making out his sworn statement of loss ; and it was to meet and counteract the effect of that evidence that the evidence as to character was allowed.

The objection that was made to the testimony was "that defendant had introduced no impeaching testimony of plaintiff's character." No objection appears to have been made to the form of the questions or answers, and the court was required to rule upon the question of the admissibility of the evidence under the specific objection made. If the testimony put in by the defendant tended to impeach the character of the plaintiff for truthfulness, the evidence offered to sustain his character in that respect was admissible ; that testimony, tending to show that he had sworn falsely upon a material matter then in issue and on trial, would have that tendency cannot be doubted. It was decided in *State v. Roe*, 12 Vt. 98, in *Paine v. Tilden*, 20 Vt. 554, and in *Sweet v. Sherman*, 21 Vt. 23, that where evidence had been introduced tending to impeach the character of a witness for truth, testimony might be introduced to sustain his general good character for truth. There was no error in admitting the evidence.

By the provisions of section seven of the act incorporating the defendant, the plaintiff would be entitled to interest on the amount of loss or damage found to have been sustained by him from the time of its happening. The defendant has no ground of complaint, therefore, of a verdict and judgment charging it with interest only from a date nearly two months subsequent to the date of the loss.

The judgment is affirmed.

J. D. WHITNEY v. THE FIRST NATIONAL BANK OF BRATTLEBORO.

grants. Deposit of Bonds for Safe Keeping. Neglect. Evidence.

1. The plaintiff delivered to the defendant bank \$4000 of U. S. bonds and received this writing: "Received of J. D. Whitney four thousand dollars, for safe keeping as a special deposit S. M. WAITE, C." Held, that it was a naked deposit without reward; that the defendant would not be liable for the robbery or larceny of the bonds, unless there was complicity or bad faith; that it was answerable only for fraud or for gross negligence; that the law demands good faith, and the same care of the plaintiff's bonds as defendant took of its own of like character.
2. The bonds were not delivered at the solicitation of defendant; the bailment was gratuitous; and it was error for the court to allow the jury to speculate as to the benefit derived from the purchase and sale of coupons.
3. It was error to instruct the jury that there might be a benefit to defendant, "perhaps in the sale of the bonds," when by the contract it had no right to sell or use the bonds; and also error in using these words, "perhaps in some other way,"—a way not disclosed by the evidence.
4. Evidence showing that other depositors of bonds in this bank had been misused, or wronged by the cashier, is not admissible to prove that the plaintiff was.
5. The facts, that the safe was left open during the transaction of business, that there was no gate in the passage way from the rear of the banking room, behind the counter, that only one person was left in charge of the bank about noon each day, do not seem so unusual as to be accounted negligence, much less gross negligence.
6. The true test of gross negligence in this case is whether the defendant took the same care of these bonds as it did of its own.
7. No notice having been given the defendant to produce its books, no request for their production during the trial, no evidence that there was any entry in them touching the bonds, and the books being in the hands of the receiver, it was error for the court to charge that their non-production might be considered by the jury to the defendant's prejudice.
8. If a party fails to call for books, when he has a right to have them, it will not be presumed that there are entries in them beneficial to such party.

CASE for negligence in keeping certain U. S. bonds. Plea, general issue. Trial by jury, March Term, 1881, TAFT, J., presiding. Verdict for the plaintiff to recover \$7,149.89. The facts in this case are sufficiently stated in the opinion of the court, and in the 50 Vt. R. 388, where this case is reported, except the following request by the defendant and charge to the jury. The defendant requested the court to charge the jury:

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"11. Upon the gratuitous bailment existing the defendant is only liable for gross negligence in the keeping of the bonds whereby they were lost.

"12. And if the jury find that the bank was robbed of the bonds, the defendant is not liable except it was guilty of some gross negligence which occasioned the loss.

"13. Such negligence is equivalent to fraud and cannot be presumed or inferred, but must be in some particular which can be stated, and must be proved by the plaintiff to entitle him to recover.

"14. The true test of gross negligence is whether the defendant took the same care of the plaintiff's bonds as it did of its own. That is the measure of its undertaking, both as defined by law, and as actually occurred between the parties upon the statement of both parties."

The court charged, among other things :

"Now, this was a contract to keep the property, the bonds of the plaintiff, safely. I believe it reads 'for safe keeping.' There is evidence tending to show that it was made at the solicitation of the cashier of the defendants. And the proof being, or the concessions in the case being, that the defendant was acting in the line of taking special deposits in that business, whatever the cashier did in the business would be the act of the defendant itself. And there is evidence tending to show that the bank received a benefit from this special deposit and deposits of like character by the purchase and sale of the gold coupons; and perhaps in some other way; perhaps in the purchase and sale of the bonds themselves. There is evidence in the case which tends to show that they purchased these coupons which were payable by the government in gold, which at that time was bearing something of a premium, and buying them at a less rate than the market quotations of them at the time that they purchased, a difference being made, the price depending upon the state of the market, and whether it was regular or settled. Of course if the market was steady for a long time, and quotations were regular at one rate, they could perhaps afford to pay nearer to it than they could where the market was fluctuating and prices changing from day to day.

"If you find that this contract was made and these bonds delivered, the special deposit made at the solicitation of the defendant, with the expectation of receiving gain and benefit, and they did receive such benefit, or expected to do so, by the buying and selling of the bonds or in any other way that justified them in their action, with reference to the matter, or that induced it, or in keep-

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ing a set of customers that they wished to have deal at the bank, or for any other reason that was satisfactory to them, although nothing was paid in money by the plaintiff to the defendant for taking these bonds and taking care of them; in that case the court tell you that the defendant was bound to exercise ordinary care and diligence in the custody of these bonds, such care and caution as a prudent man would exercise where he is guided by those considerations which ordinarily regulate the transactions of human affairs; the same rule which is conceded to be the law, and which the court tell you is the law, that exist in those cases where the bailment is one for hire or reward, as it is called; the same rule of diligence that would be required of the bank in case Mr. Whitney went to the bank and said, 'I will pay you one per cent. annually for keeping these bonds.' That is, a bailment which is called one for hire or reward."

Kittredge Haskins and E. J. Phelps, for defendant.

The bailment was gratuitous; if so the defendant was only liable for loss of the bonds caused by gross negligence. *Coggs v. Bernard*, 2 Lord Ray. 909; *Foster v. Essex Bank*, 17 Mass. 501, 479; *Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278; *First Nat. Bank of Carlyle v. Graham*, 100 U. S. 644; *Scott v. Nat. Bank of Chester Valley*, 72 Penn. 471; *DeHaven v. Kensington Nat. Bank*, 81 Ib. 95; *Nat. Bank of Allentown v. Rex*, 89 Ib. 308; *Smith v. First Nat. Bank*, 99 Mass. 605; *Jenkins v. Nat. Vill. Bank*, 58 Me. 275; *Spooner v. Mattoon*, 40 Vt. 300; *Story Agency*, s. 16; *Schouler Bail.* pp. 15 to 54; *Story Bail.* s. 23.

Gross negligence is a degree of negligence that is equivalent, or nearly equivalent, to fraud. It is precluded where the bailee takes the same care of the deposit as he does of his own similar property. It is not the want of the care exercised by the most prudent men, but of that employed by "the most inattentive." *Coggs v. Bernard*, *supra*; *Foster v. Essex Bank*, *supra*; *Tompkins v. Saltmarsh*, 14 Sergt. & R. 275; *Nat. Bank of Allentown v. Rex*, *supra*; *Story Agency*, s. 16 to 19; *Schouler Bail.*, *supra*; *Jones Bail.*, s. 8; 72 Pa. 471.

It is well settled that officers of a corporation can make no admissions that will be evidence against it, except where such ad-

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missions are part of the *res gestæ* which is in itself admissible. No antecedent or independent fact can be so proved. Ang. & Ames Corp., pp. 299-300; 1 Greenl. Ev., s. 486; Story Agency, 115; *Ruby v. Hud. Riv. R. R. Co.*, 17 N. Y. 131; *Hamilton v. N. Y. Cen. R. Co.*, 54 Ib. 334; *Nat. Bank of Lyons v. Ocean Bank*, 60 Ib. 278; *Underwood v. Hart*, 23 Vt. 120.

Martin & Eddy, for plaintiff.

In the case of bailment, it has been always understood and held that if the bailee spontaneously proposes to keep the goods of another, he is answerable for the want of ordinary care, or, in other words, he is held to the same degree of care that he would be if he was receiving a just compensation for keeping the goods. 2 Kent. Com. 565; Jones Bail. 55; Story Bail. 80, 81; Schouler Bail. 39; *Newhall v. Paige*, 10 Gray, 268; Story Bail. 153; 1 Parson Con. 431; 1st Thompson Nat. Bank Cases, 466.

If defendant took upon himself the burden of exercising a greater degree of care than he otherwise would have been obliged to take, he is liable if he fails to perform. Schouler Bail. 21; Story Bail. s. 71, p. 77; Jones Bail. 54; 2 Kent Com. 560; 2 Par. Con. 94. The defendant's fourteenth request should not have been granted. Sher. & Redf. Negl. 19; *Doonan v. Jenkins*, 2 Ad. & El. 256; *Rooth v. Wilson*, 1 B. & Ald. 59; Schouler Bail. 44, 45, 46; 2 Par. Con. 91, 92, 93; 2 Kent Com. 563.

In no case that we have been able to find has it been claimed or held that the question whether the benefits or expected benefits to be derived by the bailee from such deposits might not have formed the basis of and induced the solicitation, nor that this was not a proper question to submit to the jury, and one which would warrant them, from the receipt or contract itself, the language used and the surrounding circumstances, in finding that these did constitute an inducement and consideration to the bailee upon which his promise to keep safely was made. *Foster v. Essex Bank*, 17 Mass. 479; *Scott v. Nat. Bank of Chester Valley*, 72 Penn. 471; *Leach v. Hale*, 31 Iowa, 69; *Newhall v. Paige et al.*, 10 Gray, 366; *Lawrence v. McCalmont*, 2 Howe, 452; 48 Vt. 300; 16 How. 874; 2 Bl. Com. 453; 11 M. & W.

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113. Reasonable care demanded by a gratuitous bailment. Schouler Bail. 42, 58; 2 Kent Com. 560; Sher. & Redf. Negl. ss. 21, 23; *Newhall v. Page*, 10 Gray, 366; *Ludor v. Lewis*, 3 Met. (Ky.) 378. See also 10 Cush. 117; 37 Conn. 272; 26 Vt. 316; 6 Pa. St. 417; 62 Ill. 59; 32 Mo. 280; 14 Allen, 448.

The opinion of the court was delivered by

REDFIELD, J. This is an action on the case, charging the defendant with negligence and want of care in keeping \$4000 of U. S. bonds as a special deposit, and by which negligence said bonds were lost. The defendant executed and delivered to the plaintiff, on delivery of the bonds, the following contract or receipt:

"The National Bank of Brattleboro, Brattleboro, Vt., July 23d, 1866. Received of J. D. Whitney, four thousand dollars for safe keeping, as a special deposit. S. M. WAITE, C."

The written contract states the understanding of the parties, and by that the obligation and duties of the defendant must be determined. The words in the contract "for safe keeping," merely express the purpose of the deposit; and it would be implied if it had not been expressed. It was, as we think, a naked deposit, without reward. The possible conjectural benefit that might accrue to the defendant by purchasing the coupons, if the depositors should offer to sell them to the bank, when there was no obligation to do so, is too remote. The bank would be supposed to have provision for greater security for the safe keeping of money and valuable papers than dwelling-houses and other ordinary buildings; and it would be implied that these bonds were to be kept in the vault of the bank, and with the same security as the bank afforded to valuables and papers of like character of its own; and a less degree of care and diligence would be required than if the bonds had been received by the defendant for hire and reward, or for some temporary use of its own.

The exact measure of responsibility of a naked bailee, without reward, is stated in somewhat different language by text writers, and in the adjudged cases. Sir Wm. Jones states: "That a bailee of this sort is answerable only for *fraud* or for *gross neg-*

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lect, which is considered as evidence of it, and not for such *ordinary* inattentions as may be compatible with *good faith* . . . in this case the measure of diligence is *that which the bailee uses in his own affairs.*" The nature of the property and purposes the parties had in view, as appears from the quality of the property and character of the act of deposit, are a part of the case. Banks are instituted, and its buildings constructed, for the delivery in, and safe keeping of, money and money securities ; and these bonds were deposited in the defendant's bank for the greater security of the bonds,—“ for safe keeping.” And it must be implied that the defendant undertook to use all the appliances for the security of its own property for “ the safe keeping ” of the plaintiff's bonds, and in *good faith*. But it would not be liable for the robbery or larceny of the bonds, unless there was complicity or *bad faith*. The defendant requested the court to charge the jury that upon the evidence the bailment was gratuitous. The court declined so to charge, but did charge that the bonds were delivered at the *solicitation* of the defendant. The plaintiff testified that the cashier passed the bonds in an envelope to the plaintiff on the counter of the bank, and remarked, “ You can leave these bonds, if you would like to, for safe keeping.” Plaintiff enquired, “ if they would be safe to leave them there ? ” The cashier replied, “ they will be as safe as our own property.” There was in this no *solicitation* for the custody of the bonds, or suggestion of expected benefit, but merely a suggestion that he might leave them if *he chose to*, and they would be safe as their own property. The bank obtained no right to sell or use the bonds, but a naked *custody*. If the plaintiff left the bonds, after the interview as detailed by himself, it was of his own free will and choice. The court charged the jury that there was evidence of a *special agreement* to keep the bonds safely. But, as has been intimated, the leaving the bonds for “ safe keeping,” or accepting them for that avowed purpose, is not a covenant or warranty that the defendant will protect the bonds absolutely from all danger, or indemnify the plaintiff against loss, but is rather a declaration of the purpose of the parties in placing them in the defendant's safe, and giving the

protection and immunity which the means of safety in the bank afforded like securities of the defendant.

The court further charged that there was evidence in the case tending to show that "the bank received benefit from the special deposit by the purchase and sale of the gold coupons; and perhaps in some other way; perhaps in the purchase and sale of the bonds themselves."

It is to be noticed that the *contract* gave the defendant a naked *custody* of the bonds, without any right to *sell* or *use* the *bonds* or *coupons*. If plaintiff should thereafter elect to sell the coupons to the defendant, it was a matter of *choice*, and we see nothing in the case evidencing that in the sale of coupons to the defendant there was other *benefit* than an accommodation to the plaintiff.

We think the court erred in allowing the jury to go into speculation and conjecture to conceive a possible *benefit* to the defendant from the deposit in order to find a different rule of liability than that imposed by the *contract*. It was error to instruct the jury that there might be benefit to the defendant "perhaps in the sale of the bonds," when by the contract it had no *right* to do so; and "perhaps in some other way," a *way* not disclosed by the *evidence* or known to the court. This being a naked bailment, without reward, the legal *rights* and duties of the parties arise from the character of the property and relation of the parties. And when "the winds are let loose," and the imagination has no rein, arising from the loss of property, by the alleged robbery of a public money institution, affecting the rights of many persons, it is the more incumbent upon courts to keep the case "well anchored" in the law, and keep out of the case all evidence, especially combustible matter, that does not legally affect the *rights* and *duties* of the parties. The rule of law affecting this class of bailments (unless there be special facts which qualify the duties which this case does not disclose) would require this defendant, considering the nature of the property, to have kept the bonds, in *good faith*, within its safe, under all the safeguards afforded to like property of its own. This is the concurrent rule of the civil and common law. Jones on Bail., pp. 122-128, p. 46, note 18; Lord HOLT, in *Coggs v. Bernard*, 2 Lord Raym. 915; Chancellor

KENT, 2 Com. 562; *Foster v. Essex Bank*, 17 Mass. 479; *First Nat. Bank of Carlyle v. Graham*, 100 U. S. 644.

The plaintiff claims that there was evidence of negligence of the defendant, in this, that there was a passage way from the rear of the banking room, behind the counter, not protected by a gate; that the safe was left open, during business hours, for convenient access of the bank officers in the transaction of business; that a short time, about noon, each day, the bank was left in charge of one person, while his associate was absent to dinner. Negligence was a *fact* to be proved by the plaintiff to the jury. But there would seem nothing so unusual in these facts, if proved, that they could be accounted negligence, much less gross negligence, such as would charge the defendant. A gate was proved to be in use in *some* banks, and would be in a measure, doubtless, a barrier against intrusion, but slight in its character. New appliances for the safety of property are suggested by experience, and applied from time to time if found useful, but none have been found that subtle villainy cannot surmount or evade. All banks have not the same protection against fire, robbery and violence; and none are absolutely safe. Men have been gagged and robbed in the banks and on the street. Yet men continue to travel the street with money and valuable papers in their pockets, and cashiers continue during business hours to manage banks alone in the country villages of this state; and it is deemed safe. Robbery at midday in a country village, like lightning or the whirlwind, is not kept in mind as a present danger. When a loss occurs, the mind becomes quickened, and conceives that this or that precaution would have averted it. There are manifold inventions for the security of property, fire-proof and burglar-proof locks and safes, and more appliances in the cities where the amount and exposure is greater, but all are not the same. But where a deposit is made in a country bank or country store for safe keeping, the law implies a duty to employ the means of security, and keep it as he does his own.

II. To prove the loss of the bonds by the defendant's negligence, the plaintiff introduced the depositors of bonds, of different

character, at various times with the defendant for safe keeping; and they were allowed against defendant's exceptions to state their several interviews with Waite, the cashier of defendant's bank. In one case the depositor had lost his receipt for the bonds, and the cashier declined to account for the bonds until the receipt was produced; and when he found the receipt he intimated to the cashier that he would have lost the bonds if he had not found the receipt, whereupon the cashier requested him to leave the bank. If Waite was in the wrong in that altercation, it is not easy to see how it should prejudice the defendant in *this* case. No property was lost, but the witness intimates that Waite showed an improper *disposition*. It should be noticed that this evidence was offered, on the opening of the case, to prove the averments in the declaration, that plaintiff's bonds were lost by the *negligence* and *want of care* of the defendant. Most of this evidence does not tend to show a *want of care* but rather with the want of *good faith* in purpose and intentions. Many of the contracts of the depositors were unlike this; and in one case the cashier was specially authorized to cut off the coupons, as they became due, and give credit for them on the bank books, and the using of the coupons did not tend to show a wrongful appropriation. It would not do to prove that other depositors and customers of the bank had suffered insolvency or wrong at the hands of Waite, and therefore infer this plaintiff may have suffered in *some manner* by the misconduct of Waite. Most of the detailed interviews between other depositors and Waite are matters *inter alios*, and not a part of the *res gestae* in issue in this case, and therefore not legal evidence in this case. If it had been offered to *rebut* that part of the defence, that the bonds in question were lost by robbery of the bank, some part of the testimony of the other depositors might perhaps be properly admissible, so far as any of the testimony might tend to show the bonds deposited for safe keeping, or other property in the bank, had been wrongfully abstracted or embezzled by an officer of the bank; but no recovery could probably be had on that ground under this declaration, as it has been stated to us in argument. The fact that the defendant received on deposit bonds other than the plaintiff's was, of course, properly admissible.

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III. In regard to the charge of the court and the many exceptions to it, as the case must be sent back to the County Court for another trial, we omit to say more than we have already said, except that on this matter of the defendant's liability, we think he was entitled to have his eleventh, twelfth, thirteenth and fourteenth requests complied with. We think, also, the charge of the court that the non-production of the books of the bank by the defendant might be considered by the jury to its prejudice was error. No notice had been given to the defendant to produce the books; no request for their production during the trial; no evidence in the case that there was any entry on the books touching these bonds, and the books were then in the hands of the receiver. If the plaintiff wished the books of the bank in evidence, he should have called for them in some proper way, or otherwise "held his peace." And we see no ground of presumption that there were entries on said books that would have been of benefit to either party.

Judgment is reversed and cause remanded.

 A. S. BOYD v. THE TOWN OF READSBORO.

Highway. Notice. Injury.

In an action by a husband against a town for loss of service, &c., in consequence of injuries received by his wife through the defect in a highway, nothing can be recovered for doctoring and nursing the wife, &c., where the notice does not specifically claim damages for such doctoring, &c., the wife having recovered for her injuries in another action.

CASE for loss of services, &c., in consequence of injuries to the plaintiff's wife, and for injuries to his horse and sleigh. Trial by jury, September Term, 1880, Windham County, VEAZEY, J., presiding.

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This case is reported in the 52 Vt. R. 522. In the second trial the County Court confined the plaintiff to proving the damage to the horse and sleigh.

O. E. Butterfield, for the plaintiff.

C. B. & C. F. Eddy and *H. N. Hix*, for the defendant.

The opinion of the court was delivered by

REDFIELD, J. The action is to recover damages for the insufficiency of the highway in the defendant town; and the only exception reserved is, the sufficiency of the notice to the town, of the nature and extent of the injuries. There has been final recovery for injuries to the *wife*. In this suit the husband seeks to recover consequential damages, resulting from the injuries to the wife; but in the notice nothing is said about them. It is argued that such injuries as are specified in the notice would, necessarily, require the attendance of nurses and physicians, and the time, care and attention of himself. While such requirements are probable in the natural course of things, and in accord with the custom and usages of society, yet they are not such a necessity as to be legally inferred without averment in pleading. Many poor people do not have the attendance in such cases of physicians and surgeons; and sometimes get along better without. The statute declares that "no action shall hereafter be had or maintained in any court in this State for injuries incurred, or *damages sustained*," unless written notice shall be given, and "such notice contain a description of the injuries received, or damage sustained by such person so claiming damage." The person *claiming damage* in this case is the husband, but he has not named, much less *described*, any damage he has sustained, except injury to the horse and carriage, and the court very properly confined him to the damage named and specified in the notice.

Judgment affirmed.

TOWN OF ST. JOHNSBURY v. CALVIN MORRILL.

[IN CHANCERY.]

Equal Equities. Innocent Purchaser. Put upon Inquiry. Resulting Trust. Offset.

1. Where equities are equal, possession prevails; thus, the defendant, being one of the selectmen of the plaintiff town, and also one of the directors of a certain railroad then in process of construction, caused the land in contention to be appraised by the railroad commissioners as if to be taken for railroad purposes, and the appraisal being satisfactory to the owners, they conveyed the same by deed to the defendant, such conveyance being understood to be to the defendant for the town, and was paid for by a town order; but no such trust appeared in the deed. Afterwards the defendant sold, and received pay therefor, the same land to D. S. & Co., which company being an *innocent purchaser without notice*, went into possession, and made some improvements; and the defendant agreed to execute a deed sometime in the future. A bill having been brought to compel the defendant to deed the land to the plaintiff, *Held*, that the company and the plaintiff had *equal equities*,—both in effect *innocent purchasers*; and in such a case that the court will not turn the party in possession out, and put another party in with no better right or equity.
2. When the interest of said company was disclosed by the answer, it should have been cited in; and when the parties neglected to, the court *sua sponte* should have done so; but as the company has been treated on all sides as a party litigant, the court will so treat it; and it will be bound by the decree.
3. The company was not put upon inquiry, because it saw the workmen of the town drawing sand and gravel from this land.
4. The equity of the orator is a resulting trust. The defendant bought the land for three hundred dollars, and sold it for the same. *Held*, that the orator is entitled to a decree for three hundred dollars, and interest; that this is so although the orator drew a large amount of gravel from the land before sold; that the defendant has no offset, and could make no gain to himself; and the result is the same, though the defendant received as pay an award for land damages against said railroad, and it became worthless by reason of his neglecting to collect it for several years when he could have done so.

BILL to compel the defendant to deed a piece of land, and for other relief. Heard on bill, answer, traverse and master's report, December Term, 1879, Caledonia County. POWERS, Chancellor, adjudged *pro forma* that the bill be dismissed. The facts are sufficiently stated in the opinion.

St. Johnsbury v. Morrill.

Belden & Ide, for orator.

The facts found by the master establish the claim of the orator that the defendant took the title solely in trust for the orator, and that on request he has refused to deed to his *cestui que trust*.

The Slaughter House Company could never compel him to convey to them, because such conveyance would result in a breach of trust. *Mortlock v. Buller*, 10 Ves. 292; *Ord v. Noel*, 5 Madd. 438; *Wood v. Richardson*, 4 Beav. 174; *Thompson v. Blackstone*, 6 Beav. 470; *Bellringer v. Blagran*, 1 DeG. & S., 63; *Maw v. Topham*, 19 Beav. 576; *Perry Trusts*, ss. 176, 770, 787.

G. A. & A. M. Dickey, for the defendant.

The orator has no cause of action against the defendant for the land; and the defendant can offset the benefits the orator received from sand and gravel.

No power is given the selectmen to buy land. *Rob. Dig.*, p. 683, s. 46. Therefore the town never had any interest in the land. *Dill. Munic. Cor.*, ss. 447, 531, 419, 935. There was no resulting trust by reason of the land having been paid for by the town order. *Perry Trusts*, p. 144, s. 13; *Botsford v. Bue*, 2 John. c. 406; 2 John. c. 1; *Pennock v. Clough*, 16 Vt. 500. There was no constructive notice to the company. *Story Eq.* 400. It is a well-settled principle of law that a trustee may convey real estate held by him in trust, and thereby pass the legal title to the same to his grantee. 2 Washb. Real Pr. p. 515; 2 Lead. Cas. Eq. pp. 34, 35, 54; *Hart v. F. & M. Bank*, 33 Vt. 252.

The opinion of the court was delivered by

POWERS, J. This was a bill in chancery praying that the defendant be decreed to convey to the orator a certain piece of land described in the bill. The facts appearing from the master's report, shortly stated, are these: In 1874 the defendant Morrill was first selectman of the town of St. Johnsbury and a director of the Essex County Railroad Company, then engaged in the construction of its road. The Railroad Company laid its road across the lands of Magoon & Harlow, in such a way as to cut off a small piece of land (the same now in question), which was not wanted

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for railroad purposes, but which was needed by said town as a convenient place from which to obtain sand and gravel to make the fill for the abutments to a bridge then about to be constructed by said town. Thereupon the defendant Morrill caused said piece of land to be appraised by the railroad commissioners as if to be taken for railroad purposes, and such appraisal being satisfactory to Magoon & Harlow, they conveyed the same by deed, dated March 31, 1874, and recorded April 17, 1874, to the defendant Morrill, such conveyance to Morrill being understood to be for the town of St. Johnsbury, but no such trust appeared on the face of the deed. In payment for said land Morrill delivered to Magoon & Harlow a town order, drawn upon the treasurer of the town of St. Johnsbury, for the sum of three hundred dollars, dated March 31, 1874. Soon after the purchase of this land, men in the employ of the town commenced getting out stone and drawing dirt therefrom to make said fill, and continued this work nearly all summer. In the fall of 1874, after the completion of said bridge, the defendant sold said land to Daniels, Sylvester & Co., known and called the Slaughter House Company, for the sum of three hundred dollars, in payment whereof said company verbally assigned to said Morrill a written award in their favor of land damages against said Railroad Company for the sum of three hundred dollars. The Slaughter House Company went immediately into possession of said land, fenced and to some extent improved it, and still is in possession. At the time of said sale to the Slaughter House Company, no deed of the same was executed; but it was agreed that such deed should be executed at some future time.

The defendant Morrill in his answer among other things disclosed this sale to the Slaughter House Company, and averred that said company bought said land without notice of any claim thereto of the town of St. Johnsbury. Upon the coming in of this answer, the orator did not amend its bill, but filed a traverse denying the truth of the answer.

The case stands in an anomalous posture. The Slaughter House Co. is not made a party, but has intervened and assumed the burden of the defence, and the orator has litigated the case in

all respects as if said company was a party on the record. Said company on the facts appearing in the case should have been cited in as a party, as an interest in them was disclosed by the pleadings, and if the parties neglected to call them in, the court *sua sponte* should have done so. But as said company is in fact in the case, and has been treated on all sides as a party litigant, it will be bound by decree, and must be treated by the court as the parties have treated it, as a party on the record. And no exception being taken to the defendant's answer setting forth the claimed rights of said company, and the question on both sides having been fully litigated, whether the company is an innocent purchaser for value of the land, the court will examine the defence the same as if it had been properly pleaded by a party on the record. The legal title to the land is still held by the defendant Morrill. The orator claims a transfer of such title on the ground that the town paid for the land, and thereby a resulting trust arose in its favor. The Slaughter House Company has filed no cross bill, and therefore cannot claim a transfer of the title, but insists that it has paid for the land, is in possession, and has an equal or better right to the legal title than the orator. In other words Morrill is a stakeholder, and the orator and said company each having merely an equitable right, are contesting the question who has the best right to call for the title.

The question presented is unlike most of the cases where the defence of a purchaser for value without notice has been invoked. But the case is one where the defence may be made, although the defendant company has got no actual conveyance. Lord MANNERS observes: "I have always thought that he who had *the best right to call for the legal estate* is entitled to this defence." 1 Ball & Beat, 171. Lord COWPER lays it down as a rule that a purchaser for value without notice shall not be damaged in equity, not only where he has a prior legal estate, but *where he has a better right to call for a legal estate than his adversary*. Lord HARDWICK sanctions the same doctrine in *Willoughby v. Willoughby*, 1 Term R. 768. Lord CRANWORTH declares that the principles on which the court protects a purchaser for value without notice is *not* confined to cases where he has got in the legal estate, and that circum-

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stance will be quite unimportant in determining whether the court will interfere or not. He says further, speaking of the case in hand, "His equity depends on this, that he stands equitably in at least as favorable a position as his opponent, and therefore the court will not interfere against him." 5 House of Lords C. 905. Lord REDESDALE lays down the rule as follows: "Supposing a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title, yet if the defendant has any equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interpose on either side." Mitford Pl. 361. The doctrine is clearly set forth in notes to *Bassett v. Nosworthy*, 2 Lead. Cases in Equity, 102.

It is argued that the defendant has in fact paid nothing for his purchase. But we think a fair construction of the report shows payment. A verbal assignment of the award for damage is as valid as a written one could be. In either case the assignee would have to enforce it in the name of the assignor. The delivery of the award in payment to Morrill, and taking possession of the land by the purchaser made the agreement an executed one, save the formality of executing the deed. Morrill alone had the right to collect the award, and it is his fault if it has become worthless.

It is also insisted that the Slaughter House Company was put upon inquiry when they saw the workmen of the town engaged in drawing sand and gravel for the land. The master says they had no actual notice as to the ownership of the land at this time, and submits to the court the question whether they were put upon inquiry. This is a practical question to be determined upon the general course of things in such cases. It is more consistent with the usual custom in such cases to suppose that the town had secured the right to draw away the sand and gravel than that they had purchased the land itself, and when the company afterwards came to purchase the land and found the record title in Morrill, it is too far fetched to say that they ought to inquire whether there was not some latent equity outstanding in the town.

On the whole, we think the company bought and paid for this land in good faith without any notice that the orator had any

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equitable claim to it, and the question arises whether the orator should be allowed to get in the legal title. It is undoubtedly true that as between equal equities the maxim, first in time first in right, applies. But if the equities are unequal, the maxim does not apply. The equity of the orator is a resulting trust based solely upon the payment of money. It amounts simply to the equity of a purchaser for value in good faith without notice.

The equity of the defendant company is the equity of a purchaser for value in good faith without notice. To this extent the parties are on an evener. But the defendant company is in possession, and has expended money in repairs and improvements. They may well say to the court, you should not interfere, when our right to possession is just as good as the orator's, to turn us out and put the orator in, or transfer the legal title to the orator so that it will be enabled to turn us out. But as MITFORD says *supra*, "the court will not interpose on either side." In Broom's Maxim, page 718 (7th Ed.) it is said, "In the Court of Chancery where two persons having an equal equity have been equally innocent and equally diligent, the rule generally applicable is, *melior est conditio possidentis*."

It is clear that the defendant company has at least as good claim to the legal title in the hands of the stakeholder as the orator has, and this is sufficient reason for denying its transfer to the orator. If one of two innocent parties must suffer for the wrong-doing of a third, that one who made it possible for the wrong to be done should suffer rather than the other.

Morrill's purchase and sale of the land was accomplished by reason of his official relation to the town. By this bill the town ratifies the act of its officer, and seeks to reap the benefits of his purchase. Having given him the power to act, and he having acted in a way that works mischief to innocent parties, the town cannot claim the profits of the experiment and ignore its losses.

When a trustee misappropriates the funds of his *cestui*, the *cestui* may affirm the act, and take the thing received, or go for the money misappropriated. Here the purchase of the land for the purposes of the town was proper, but when it was sold the town was entitled to the consideration received; and if the defendant

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Morrill has allowed the award for land damages to become worthless in his hands, he should account for it to the town. The argument of the defendant that he can offset against this claim the value of the profits made to the town by his purchase is fallacious. The trustee can make no gain to himself from his wrongful acts. The *cestui* is entitled to all the gains made by the use of his frauds. It does not definitely appear when the defendant received the award; it is said in the Report that it was in the fall of 1874. Interest may be safely awarded from December 1, 1874.

The orator is entitled to a decree for the payment by the defendant Morrill of the sum of three hundred dollars with interest from December 1, 1874. As the orator has failed upon the issue made by the Slaughter House Company, he should recover no costs for master's fees or witness debenture.

Decree reversed, and decree for orator in accordance with these views.

THE SELECTMEN OF GLOVER v. GEORGE W. MCGAFFEY
AND OTHERS.

[IN CHANCERY.]

Mill Dams.

The act of 1869, "regulating mill and other dams," did not authorize the committee appointed by the County Court to make an order, in the first instance, directing the owner to lower his dam; or, one that would have that effect,—as to raise his head-gate.

HEARD on bill, answer, replication and testimony, February Term, 1881, Ross, Chancellor. Decree *pro forma* for the orators. The bill was brought by the selectmen of Glover and based on the following order: *

* ACT OF 1869. Sec. 2. If in the judgment of the committee so appointed such dam is insufficient and unsafe, they shall determine and direct what alterations, repairs or additions are required to make it sufficient and safe; and shall give a written direc-

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"STATE OF VERMONT,) Whereas the assistant judges of Or-
 ORLEANS COUNTY, SS.) leans county court in the state of Ver-
 mont did on the 27th day of May, 1876, appoint us, the under-
 signed, commissioners to examine as to the safety and sufficiency
 of a certain dam and reservoir situated in Glover, in said county,
 and commonly called 'Stone Pond.' Said dam was owned by
 G. W. McGaffey, of said town of Glover. Now, agreeably to
 said commission, we the undersigned having made an examina-
 tion of said dam, and heard the parties interested in and about
 the same, we are unanimous in the opinion that said dam is insuffi-
 cient, unsafe, and dangerous, in the present condition to the
 property-owners on the stream below, and particularly so to the
 inhabitants of Glover Village. We therefore make the following
 order for the time being: That the said G. W. McGaffey shall
 immediately commence to reduce the water in said pond by rais-
 ing his head-gate at his flume, not exceeding eight inches, so as
 to gradually reduce said pond of water down to the bottom of his
 said flume by the first day of September next, and then to let said
 gate be up so that the water naturally coming into said pond may
 flow out through said flume till further order. The above order
 is made by the consent of all parties interested.

Glover, June 24th, 1876." (Signed and recorded in the town
 clerk's office.)

The orators prayed that the defendants be compelled to comply
 with the foregoing order.

W. W. Grout, for the orators.

Poland and F. W. Baldwin, for the defendants.

The opinion of the court was delivered by

Taft, J. The statute of 1869 gave the committee appointed
 by the county judges power to determine and direct what "altera-

tion to the owner thereof to make such alterations or repairs within such reasonable
 time as said committee shall name in said writing; and they shall make a record of
 their doings, together with such direction as they shall give, in the town clerk's office
 in the town where such dam is located; which record shall be admissible though not
 conclusive evidence in the trial of any issue involving his liability on account of such
 dam.

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tions, repairs, or additions," were required to make the dam sufficient and safe. The committee ordered the defendant to raise his head-gate and cease using it. This practically lowered his dam and prevented his securing the amount of water the pond had theretofore held. The effect was the same as the removal of the upper part of the dam. Was this such an order as section 2 of the act of 1869 contemplates? such an one as the committee had the right to make? We think not. Raising the gate and keeping it up was not an alteration, repair of, or addition to, the dam, such as we think the legislature had in mind in passing the statute, or that is fairly within the meaning of the words of it. The fair import of the words is, a change in some way of the material structure of the dam, something that will make the dam stronger and not prevent the owner from using it, to secure the usual quantity of water in his pond. The order made was equivalent to one directing the removal of the dam, or a portion of it. That such an order was not contemplated in the first instance we think is evident from the words of the statute; and we are confirmed in this opinion by the fact that section 3 of the act provides that after an order is made under section 2, and the owner of the dam refuses or neglects to make the "alterations, repairs, or additions" ordered by the committee, the committee are then given the power to remove the dam, or such parts thereof as they may deem necessary to protect the property on the stream below, clearly implying that this was not within the power of the committee in the first instance. This view of the order renders it unnecessary to pass upon the constitutional and other questions in the case, as the act of 1869 is not now in force; for, if not repealed by the act of 1876, it has been since, by the passage of the Revised Laws, among which the provisions of the former act are not included.

The *pro forma* decree of the court of chancery is reversed and cause remanded, with a mandate that the bill be dismissed.

A. M. MCPHAIL & CO. v. JOSHUA GERRY.

*Lien Law. Conditional Vendor. Attaching Creditor with
Notice. R. L. s. 1992. Deposition.
Punctuation of Statute.*

1. In the statute, R. L. s. 1992, relating to the lien of conditional vendors, the words, "without notice," refer to and qualify the words, "attaching creditors," as well as the words "subsequent purchasers."
2. Under the statute the rights of a conditional vendor are superior to those of an attaching creditor *with knowledge of the lien*, though the lien was not recorded within thirty days. It is immaterial from what source the knowledge is obtained.
3. The punctuation of the original act, as passed by the legislature, governs instead of that of the printed copy.
4. When there is no exception to the report of a referee the court will not pass upon his ruling in regard to a deposition.
5. R. L., s. 1992, vendor's lien, construed.

TRESPASS for taking a piano on which the plaintiffs had a lien. Heard, December Term, 1881, Orange County court, on the report of a referee, POWERS, J., presiding. Judgment *pro forma* for defendant.

The referee reported that the plaintiffs, on the 7th day of June, 1876, sold and delivered to one Mark S. Page a piano for the price of \$300; that they took a note for the same, payable in installments of \$25 each month, and reserved a lien on the piano, as follows: "Which said piano is to remain the property of said McPhail & Co. until the above sum of \$300 is paid in full; and the said McPhail & Co. have the right to take possession of said piano at any time on failure of any of the above payments; and all payments before made to be forfeited"; that, on the 18th day of July, 1876, the note and lien were recorded in the town clerk's office of Bradford; that on the 24th day of October, 1876, the defendant caused the piano to be attached on a writ in his favor against said Page and as said Page's property; that several other creditors of Page also attached the piano, executions issued, and the piano duly and regularly sold thereon; and that a con-

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siderable amount of the note was due and unpaid at the time of the attachment, but that the plaintiffs had not taken possession of the piano, although they attempted to do so on the day it was attached. On the question of the defendant's knowledge of the plaintiffs' lien the referee reported :

"Before the defendant attached the piano as aforesaid he knew from said Page that plaintiffs had a lien thereon for the purchase money; but he thought the lien was not good, because not seasonably recorded. Page did not show defendant the lien, nor did he ever see it; but he had been informed and knew that it was recorded, but he never saw the record."

On the hearing it appeared that the plaintiffs had taken two depositions, one earlier than the other, of Thankful C. Page. Only one was read. The other one had never been filed, nor used in evidence, but had been opened and the plaintiffs had it at the hearing. The defendant's counsel asked the referee to order the deposition to be produced. The referee refused to make the order.*

Farnham & Chamberlain, for the plaintiffs.

Notice of the lien answers all the purposes of a record. *Kelsey v. Kendall*, 48 Vt. 27. In the original engrossed bill there is a comma before the words "without notice." This punctuation leaves no doubt that the legislature intended that the words "without notice," should apply to both "attaching creditors" and "subsequent purchasers." *Bugbee v. Stevens & Bagley*, 53 Vt. 389; *Whitcomb v. Woodworth*, 54 Vt. 74, 544. Alabama and Iowa have statutes similar to ours. In both notice is equivalent to a record. *Magee v. Carpenter*, 4 Ala. 469; *Smith & Co. v. Zuchee*, 9 Ala. 208, 921; *Dearing v. Watkins*, 16 Ala. 20; *DeVerdal v. Malvone*, 25 Ala. 272; *Boyd v. Beck*, 29 Ala. 703; *McGuvern v. Haupt*, 9 Iowa, 83; *Allen v. McAlla*, 25 Iowa, 464; *Jones Chat. Mortg.* ss. 81, 817; 47 Iowa, 418; 51 Iowa, 655; 59 Ala. 503; 38 Vt. 252; 12 N. H. 339; 13 N. H. 46; 8 Vt. 373.

*The printed statute of 1872, No. 51, is as follows: "No lien reserved on personal property sold conditionally and passing into the hands of the conditional purchaser shall be valid against attaching creditors or subsequent purchasers without notice," &c.

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John H. Watson, for the defendants.

The notice, in order to be sufficient, must emanate from the party holding or claiming to hold the lien. *R. L. s. 1069*; *Stevens v. Wisley*, 80 Vt. 661, 665, 701; *Bank v. Drury*, 35 Vt. 469. The record of the lien having been made more than thirty days after the delivery of the property, had no force. *Bugbee v. Stevens & Bagley*, 53 Vt. 389; 2 Watts, 78. The words "without notice" refer to and grammatically limit simply the words "subsequent purchasers," and not the words "attaching creditors." The intent of the legislature must have been to so amend the statute of 1870 as to make it comply with the general law and policy of the State relating to the sale of personal property and the accompanying change of possession. *Daniels v. Nelson*, 41 Vt. 161; *Hart v. Bank*, 33 Vt. 263; *Perrin v. Reed*, 35 Vt. 2. But if creditors are affected with notice, it must be actual. 3 Ves. 478; 19 Ves. 435; 1 Mod. 300; 31 E. L. & Eq. 89; *Jones Chat. Mortg. s. 309*; 19 Me. 167; 13 Met. 200. Burden on plaintiff to show sufficient notice. *Whitcomb v. Woodworth*, 54 Vt. 544.

The opinion of the court was delivered by

TAFT, J. The disposition of this case depends upon the construction of the act of 1872, relating to liens reserved on property sold; whether the words "without notice" refer to and qualify the words "attaching creditors," as well as "subsequent purchasers." The defendant contends that they do not, as there is no comma after the word "purchasers"; but it appears that in the original act the comma was there inserted; and in this respect the original act must govern instead of the printed copy. We think the construction contended for by the defendant should not be given the printed act. It is not the natural one; and there is no reason why a person attaching property which he knows is not that of his debtor should stand in a more favored situation in respect to it than one who buys it with like knowledge. It is immaterial from what source such knowledge is obtained. The question is, did he have notice of such lien? If he did, he acquired no rights as against the vendor. We think the notice in this case sufficient. He knew of the plaintiff's lien, and of its record, but

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had not seen it; he was an attaching creditor with notice. No exception was taken to the report of the referee as to the ruling in regard to the deposition of Thankful C. Page. The question, therefore, is not before us.

The judgment of the County Court is reversed, and judgment for plaintiff.

Ross and ROWELL, JJ., did not sit.

JONATHAN ROSS v. JOEL SHURTLEFF AND OTHERS.

[IN CHANCERY.]

Equitable Mortgage. Court has jurisdiction to foreclose. Multifariousness. Joinder of Defendants. Levy of Execution.

Judicial Notice. Recognizance for Review.

Audita Querela.

1. The Court of Chancery has jurisdiction to foreclose a mortgage in whatever form it may exist,—as an equitable mortgage.
2. Objection for multifariousness must be made by demurrer.
3. F. was properly joined as defendant, as the bill alleges that he had joined in bringing *audita querela* to vacate the levy of an execution, under which the orator claims title; and this allegation is not denied by the answer.
4. A fact charged to be within the knowledge of the defendant, and the answer silent as to it, taken as admitted.
5. The levy of an execution, correct, except by mistake it described the judgment as rendered by the County Court when it was rendered by the Supreme Court, is not void.
6. The levy of an execution, claimed to be void for uncertainty, "on one undivided 12966-21900th part" of an equity of redemption, "Subject to the Burke levy" is held valid.
7. The levy was made in 1869; *audita querela* brought to set it aside in 1877; if there was any error it was cured by statute, R. L. ss. 1596, 1598.
8. An execution (levied on real estate) bears interest by statute, R. L. s. 1547.
9. A deputy sheriff, holding an original execution at the time he was removed from office, may levy on real estate an alias afterwards issued in the same suit, R. L. s. 860.

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10. A writ of *audita querela* brought in the County Court to vacate a record in the Supreme Court was improperly issued.
11. The memorandum made by the justice of the recognizance for review was as follows: "The plaintiff as principal and — as surety recognized to the defendant in the sum of \$275.50 as the law requires for the said Cole's right of a trial of the case at any time within two years from the date of this judgment." The court think this is sufficient; but if not, the defendants cannot take advantage of the error.

HEARD on bill, answers, replication and evidence, June Term, 1881, Caledonia County, POWERS, Chancellor. Decree *pro forma* for the defendants. The bill set forth in substance that:

A deed of defeasance from Freeman Capron to Joel Shurtleff, September 27, 1867, of certain premises in Walden, conditioned for the payment, among other things, of Shurtleff's promissory note of that date for \$50, with interest annually, which note the orator now owns, and avers that the same is unpaid; the conveyance of the premises by Shurtleff and other intermediate owners to those now claiming to own them; the recovery of a judgment by *O. S. Burke v. Shurtleff*, and a set-off of a portion of the equity of redemption of said premises on an execution issued on the judgment; the failure of Shurtleff to redeem; and the conveyance by Burke of his interest to one of the defendants; the recovery of a judgment by Harvey Cole against Joel Shurtleff; the issue of various executions on said judgment, and a set-off, the last one by C. F. Weeks, deputy sheriff, on the same, December 27, 1869, of ~~1/2~~ undivided part of the equity of redemption of said premises, which execution, (being made on a County Court blank by clerical error), read as though the judgment was recovered before the *County*, instead of the Supreme Court, but describes the judgment otherwise correctly, and the term of the court as held when only by law a term of the Supreme Court could be held, and the failure of Shurtleff to redeem; the subsequent recovery of a judgment by the orator against Cole, the due issuing of an execution thereon and of the set-off thereon of the same interest in the premises which had been set off to Cole; the failure of Cole to redeem, and that said portion of the equity of redemption of the premises had become vested in the orator; that the orator was Cole's attorney in his suit against Shurtleff; that Cole had paid him nothing for his services or disbursements, and that the orator should be paid out of the avails of his judgment and set-off against Shurtleff; that Shurtleff conveyed the premises by deed of warranty to defendant Farrar, who also conveyed them by deed of warranty; that Dr. J. S. Durant

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sued Shurtleff and summoned Farrar as his trustee, claiming to hold him for a part of the unpaid purchase money of said premises ; that Farrar defended on the ground that the levy in favor of Cole was an incumbrance on the premises, and obtained a discharge in the Supreme Court on that ground ; and then in the name and with the consent of Shurtleff, or jointly with Shurtleff, brought a writ of *audita querela* to the June Term of Caledonia County Court, 1877, against Cole, who had previously fled the country, to have Cole's execution and set-off against Shurtleff vacated and set aside, because the execution describes the judgment as recovered before the "County" instead of the "Supreme" Court, and because they claim that the officer's return on the execution is false, in that it states that Shurtleff agreed with the officer upon the appraisers. The bill avers that Shurtleff and Farrar cannot contradict the officer's return if untrue, but that the same is true ; that they knew of the defects now complained of when they maintained that the set-off was valid in the Durant suit, and ought in equity to be estopped from asserting them ; that the *audita querela* was not properly served upon Cole, and whether properly served or not, that the County Court had no jurisdiction of the same ; that the same was brought to affect the orator's title to the premises, knowing that Cole was out of the country and would not defend, and that the orator could not appear in that suit ; and that the Statute of Limitation in equity had run upon the right of Shurtleff to maintain the writ of *audita querela*.

The bill prays for a foreclosure of the equitable mortgage in favor of the orator ; for an apportionment of the same between the orator and the other defendants according to these respective interests in the mortgage premises ; for a partition of the premises between the orator and the other defendants ; for an accounting of the rents and profits ; and for an injunction of the suit of *audita querela*. The bill was confessed by all the defendants except Shurtleff and Farrar who answered separately, and claimed as stated in the opinion of the court.

RETURN ON EXECUTION.

"I extended and levied this execution on one undivided 12956-21900th part of a certain piece of land with appurtenances thereof, situate and being in Walden, containing about two acres of land, more or less, and bounded as follows : A part of lot No. 2 in great lot No. thirty-four, and lot No. 1, in great lot No. thirty-four, meaning to convey the saw mill and yard, and also a strip of land on the west side of the brook or outlet of the pond, commencing three rods west of the corner of the saw mill, running northerly to the west end of the dam. Also a piece of land on the east side of said brook two rods in width from the dam, southerly to the road, on said brook ten rods in width, running down said brook fifteen

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rods, meaning to convey the same land and premises deeded to Nathan Chamberlin by Peter B. Laird, the 12th day of December, A. D. 1860, together with the same privileges and reservations, the proper estate of the said Joel Shurtleff in fee, on which said estate there is a mortgage to Freeman Capron to secure one hundred and fourteen dollars. Also an execution in favor of O. S. Burke against Joel Shurtleff of \$31.89, which I have this day levied on said estate, and said parties mutually chose Chas. A. Kittredge, Marshall Jackson and Abial Shurtleff, three judicious and disinterested freeholders of the vicinity in the same town in which said estate lies, to appraise the same, which said appraisers after being duly sworn by me agreeably to law, did then and there ascertain and state the sum due on said mortgage to said Freeman Capron to be one hundred and fourteen dollars ; also an execution in favor of O. S. Burke against Joel Shurtleff to be thirty-one dollars and eighty-nine cents, which has been this day levied on said estate, did on view of the estate above described, appraise one undivided 12956-21900th part of said estate, subject to said mortgage as above stated, and subject to said execution as above described, at the sum of one hundred and twenty-nine dollars and fifty-six cents, as its first and true value in money to satisfy this execution with all fees as stated is the bill hereunto annexed, and I have set out the said undivided 12956-21900th part of said estate, so by them appraised in full satisfaction of this execution and of the fees aforesaid, by the same metes and bounds which are mentioned in the above description thereof."

The memorandum of the recognizance for review in the justice suit of *Ross v. Cole*, was :

"The plaintiff as principal and Walter C. Smith as surety recognized to the defendant in the sum of \$275.50 as the law requires for the said Harvey Cole's right of a trial of the case at any time within two years from the date of this judgment."

H. C. Bates and *H. C. Ide*, for the orator.

M. Montgomery and *J. A. Wing*, for the defendants.

The opinion of the court was delivered by

Taft, J. The orator seeks to foreclose a mortgage upon land in Walden. The mortgage was by deed of defeasance conditioned for the payment of a note now held by him. He claims to own an undivided interest in the equity of redemption, and asks by the bill to have partition made ; the defendants, his co-tenants, to account for the rents and profits for the time they have been in possession, and a suit of *audita querela* brought to vacate a levy, under which he claims, perpetually enjoined.

Ross v. Shurtleff.

The defendants make several objections to a decree for the orator.

I. That he has a remedy at law, and equity no jurisdiction. The foreclosure of a mortgage, in whatever form it may exist, and this is a bill praying for one, is a proper matter for the cognizance of a Court of Chancery.

II. That the bill is multifarious. If such is the fact the objection was made too late. It should have been interposed by demurrer. *Wade v. Pulsifer*, 54 Vt. 45.

III. That Farrar was improperly joined as party defendant. The bill alleges that Farrar joined in bringing a suit of *audita querela* to vacate the levy of an execution, under which the orator claims title to a portion of the premises in question, and asks to have the suit enjoined. If the suit is maintained it is apparent that the title of the orator fails. Farrar does not deny in his answer that he did so join in instituting the proceedings, but insists that he ought not to be made a party to this suit, as the bill does not show that he has any interest in the *audita querela* proceedings. There is a direct allegation in the bill that he joined in bringing the suit, and it was the duty of the defendant Farrar to answer it directly; it was peculiarly within his knowledge. His answer is silent as to the fact; and the rule in such a case is that where the bill charges a fact to be within the knowledge of the defendant, or which may fairly be presumed to be so, if the answer is silent as to the fact, it will be taken as admitted. 1 Dan. Ch. Pl. & Pr. (4th Am. Ed.) 887, n. 4. He, having brought the proceedings or caused them to have been instituted, is a necessary party to this suit which is brought to have them enjoined.

IV. Five objections are made to the validity of the orator's rights under the levy of execution in the case of *Cole v. Shurtleff*.

1. That the execution describes the judgment as rendered by the County Court when it was in fact a judgment of the Supreme Court;

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2. That no appraisers were appointed to appraise the property ;
3. That the levy was void for uncertainty ;
4. That it was void because the mortgage was misdescribed ;
5. That the portion of the premises set off was described as being subject to the Burke levy.

The clerk in issuing the execution described the judgment as rendered by the County Court, when in fact it was a judgment of the Supreme Court. We think the error a clerical one. It was *obviously* an error. The names of the parties and the damages and costs were stated correctly ; the execution was formal in all respects ; it was signed by the proper authority ; and it was stated in it that it was recovered at a time *when only the Supreme Court could have been in session, a fact of which judicial notice must be taken*. Just what the correction should be is apparent from the instrument itself ; it furnishes the data for its own rectification. It being merely a misprision of the clerk, the levy was valid in itself. Upon the evidence the court find that Shurtleff agreed upon the appraisers and the amount due upon the mortgage, and that the amount was correctly stated ; no question can now be made upon either point. *Durant v. Shurtleff, supra*. We do not think there was any uncertainty about the levy. The statute governing levies was substantially complied with, and although the officer states that it was made subject to the Burke levy no injury could possibly result from such statement, and it was apparent that all that the debtor would be called upon to pay was the mortgage encumbrance, and the error, if any, was cured by the provisions of our statutes relating to defective levies. R. L. ss. 1596, 1598. The Burke levy was the set-off of an undivided portion of the equity, and making the Cole levy subject to the Burke levy means no more than that the officer did not attempt to set off to Cole any of the undivided parts that he had already set off to Burke.

V. The question so elaborately argued that the executions were not entitled to interest, and therefore the levies under them void, is governed by R. L. s. 1547, which provides for the collection of interest on final process.

VI. The officer who made the levy of the orator's execution against Cole held an original execution in his hands at the time he was removed from office. We think that under s. 860, R. L., he could complete the service of it, and also of any alias issued in the same suit. He himself obtained the aliases in order to finish the business he had in his hands at the time his deputation as sheriff was revoked. We think it clearly within the spirit and letter of the statute to permit him to do so.

VII. The defendants further object to the orator's levy for the reason that the recognizance taken before the execution issued, was defective. The memorandum of the justice made upon the writ states that it was taken "and the surety recognized as the law requires." The sum in which it was taken was correctly stated. The memorandum shows what it was for; intelligibly expresses the object of its being taken, and the name of the recognizer was stated. If there is any defect in the minute made by the justice, it was undoubtedly supplied by him when he made up the record. There is no evidence before us of the record, only a copy of the original writ and the minutes of the justice made upon it. We think it sufficient. 10 Vt. 525; 11 Vt. 590; 13 Vt. 639. That the defendants cannot take advantage of such an error, see *Essex Mining Co. v. Bullard*, 43 Vt. 238.

VIII. The *audita querela* was brought in the County Court; the record sought to be vacated is in the Supreme Court. The writ was improperly issued. *Warner v. Crane*, 16 Vt. 79.

The *pro forma* decree of the chancellor is reversed and cause remanded, with a mandate that a decree be entered for the orator, in accordance with the prayer of the bill, with costs.

REDFIELD, J., did not sit.

Bowman v. Brown.

JOHN L. BOWMAN v. H. A. BROWN AND JESSE HALL.

Impounding Cattle.

1. When one without force or fraud has taken another's cattle in his own enclosure and is proceeding to impound them, the owner cannot lawfully "fight himself" into legal possession, and thereby rescue them, but he must resort to the law; and this is so although the impounding is without right.
2. R. L. s. 3998, rescuing beast being impounded, construed.

TRESPASS. The declaration contained four counts. The first, second and fourth counts were based on the statute, R. L. s. 3998, passed to prevent the owner of a beast from impeding an impounder; the third count was for assault and battery. Plea, general issue. Trial by court, Windsor County, May Term, 1881, TAFT, J., presiding. Judgment for the plaintiff.

It appeared on trial that the defendant's cow was kept in a pasture near the plaintiff's enclosure, with an arable field between the pasture and enclosure; that there was a fence between the field and pasture, but by agreement of the owners none between the field and said enclosure; that the cow escaped into this field and thence on to the plaintiff's land, where he seized her, tied her to a post and was about to drive her to the pound, when said Hall, a servant of said Brown, and by his direction, forcibly took the cow from the plaintiff; that said Brown, when he learned where his cow was, went to the plaintiff and proposed to pay for any damage that had been done by the cow; that the plaintiff said all he wanted was that the defendant should take the cow and take care of her, but said Brown did not give him to understand that he would do so, but proceeded to untie the cow, and finally directed his servant, Hall, as stated above. The testimony was conflicting; but the court found that the plaintiff did not relinquish possession of the cow, or his intent to impound her, and that he was guilty of no unreasonable delay in carrying his design to impound her into execution; and further found that the plain-

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tiff in his attempt to retain possession of the cow was injured in his person, by reason of the acts of the defendants, and suffered damages in consequence thereof to the amount of sixty dollars.

D. C. Denison & Son, for the defendants.

The plaintiff cannot sustain his action unless he was lawfully in possession of the cow. *Barrows v. Fassett*, 36 Vt. 625. There was no division fence, by agreement of the adjoining owners; therefore, the plaintiff had no right to impound, because it was his own neglect that his land was not protected. *Ladue v. Branch*, 42 Vt. 574; *Hooper v. Kittredge*, 16 Vt. 677; *Wilder v. Wilder*, 38 Vt. 678; *Porter v. Aldrich*, 39 Vt. 326.

Hunton & Stickney, for the plaintiff, claimed in their argument substantially as the court hold.

The opinion of the court was delivered by

VEAZEY, J. The recovery below was had, under the count for assault and battery, for injuries received by the plaintiff while proceeding to impound the cow of the defendant Brown and in resisting the assaults of the defendants in their efforts to rescue the cow. The defendants claimed they had the right to retake the cow and to use such force as was necessary for that purpose, for the alleged reason that under the facts found the plaintiff had no legal right to impound the cow. The plaintiff had not obtained possession wrongfully or with any fraudulent purpose. The cow was in his enclosure and he was proceeding to deal with it as he thought he had a right to do. Defendants' counsel insist that the rule is established in this State to the effect that a person who is out of possession may lawfully "fight himself" into legal possession. This rule has not been expressly adopted except in cases where the owner was dispossessed by force or fraud and the pursuit was fresh. *Hodgedon v. Hubbard*, 18 Vt. 504. And such cases have been somewhat criticised but not overruled. *Dustin v. Cowdry, et al.*, 23 Vt. 631. The statute provides that "a person may impound a beast found in his enclosure doing damage." R. L. s. 3978. It also provides a penalty for rescuing a beast

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from the custody of a person driving or being about to drive it to pound. R. L. s. 3998. If a beast is impounded without right, the owner has ample legal remedy. We think the effect of the statute is to restrict interference by force to rescue the beast. It clothes persons whose premises have been invaded by their neighbors' stock with a *quasi* official power. Like officers serving process they proceed at their peril, but it is only a legal peril. This construction would conduce to peace and good order, while the other view would naturally promote encounters and encourage breaches of the peace, where the law furnishes full remedy for the protection and settlement of respective rights.

If the County Court had found the facts to be as it found the defendants' testimony tended to show them, there would have been strong ground for holding, as the defendants' counsel now claim, that the plaintiff gave up his purpose to impound and surrendered the possession of the cow, after which he had no right to interfere; but the court say the testimony on these facts was conflicting and find against the defendants on this point. The exceptions do not expressly state that the plaintiff notified the defendants of his purpose to impound the cow, but we think they state enough to show that the defendants so understood it.

The judgment of the County Court is affirmed.

HOLLIS McDOUGALL AND JOHN McDOUGALL v. J. C. PAGE
GEORGE YOUNG v. J. C. PAGE AND
B. L. D. CARPENTER.

*Bankruptcy. Discharge when does not affect a Foreign Creditor.
Debt discharged, how revived.*

1. A clear, distinct, and unequivocal promise to pay is essential to a reviva' of a debt barred by a discharge in bankruptcy.
2. A debt contracted and payable in Canada by a person resident in this State to a person resident in Canada is not barred by a discharge under the U. S. bankrupt act, when the foreign creditor neither proved his debt in bankruptcy, though provable under the act, nor in any way was a party to the proceedings nor had personal notice thereof.

ASSUMPSIT. Heard on a referee's report, February Term, 1879, Orleans County, REDFIELD, J., presiding. Plea, discharge in bankruptcy. Replication, a foreign contract, a foreign creditor, and a new promise. Judgment *pro forma* for the defendant. The referee found the following facts:

The debt was contracted in Canada, October 19th, 1874. At that time and since the plaintiffs were residents in Canada, and carried on business there; at the same time the defendant was a resident in Vermont. On the 24th day of December, 1874, the defendant filed in the U. S. District Court for the District of Vermont his petition to be adjudged a bankrupt, and was so adjudged; and such proceedings were had that on the 7th day of March, 1876, he received from that court his discharge discharging him from all debts which existed and were provable against him under the bankrupt act, on the 24th day of December, 1874. This debt was not proved against the defendant in the bankruptcy proceedings; the plaintiffs had no personal notice, and in no way were they parties to the said proceedings. The other facts are stated in the opinion.

Edwards & Dickerman, for the defendant.

Proceedings in bankruptcy are in no just sense *ex parte* in their character; for notice is required to be given to the creditors, either personally or by publication. U. S. R. S. s. 5019; *Lathrop v. Stuart*, 5 McLean, 167; Bump (9 Ed.), 395. After legal notice has been given, creditors must be treated as having notice of the proceedings. *Smith v. Breinkerhoof*, 6 N. Y. 305; 8 Barb. 519; 7 How. 643. When a discharge is pleaded the court will presume that legal notice was given, and that the creditors were parties to the bankruptcy proceedings. *Lathrop v. Stuart*, 5 McLean, 167; Bump, 735. A discharge cannot be impeached by any omission unaccompanied by fraud. *Payne v. Abel*, 4 B. R. 67; *Burnside v. Brigham*, 8 Met. 75. Foreign creditors are notified in the same way that domestic creditors are. *In re Julius Hays*, Supplement to Bankruptcy Report, 1 Vol. p. 21. Had the contract been made here, though the creditor was domiciled in Canada, the discharge would be a bar. Story Conf. of Laws, ss. 340, 342; *Peck v. Hibbard*, 26 Vt. 698. A discharge bars a foreign as well as a domestic creditor. There is no need of an express declaration of the legislature that foreign creditors are included. Bump, 746; *Murray v. Rotterdam*, 6 Johns. Ch. 52; *Pattison v. Wilber*, 12 B. R. 193, (same case 10 R. I. 448); Story Conf. of Laws, ss. 334, 349; *Penniman v. Meigs*, 9 Johns. Ch. 325; *Blanchard v. Russell*, 13 Mass. 6; 4 Johns. Ch. 460; 7 Johns. Ch. 313. The plaintiff by suing in our courts submits himself to the *lex fori*, and cannot deny *here* the legal effect of the discharge under our law. 9 Johns. Ch. 325; 6 Johns. Ch. 52; 4 Law Reporter, 480; 10 Mass. 340; *Smith v. Buchanan*, 1 East, 6; *Quin v. O'Keef*, 2 H. Black. 553; *Agnew v. Platt*, 15 Pick. 420; *Brigham v. Henderson*, 1 Cush. 433; *Ogden v. Saunders*, 12 Wheat. 213; *Sawyer v. Marsh*, 10 Met. 594. The *lex fori* must govern. WASHINGTON, J., in *Ogden v. Saunders*, *supra*, 261, 263; JOHNSON, J., in same case; *DeLaRose v. Priest*, 11 E. C. L. 578. A discharge valid where granted has the same effect in another country. Lord MANSFIELD in *Baldwin v. Goulding*, Cook Bankruptcy Laws, 487; *Hunter v. Potts*, 4 Term, 108 (183); *Edwards v. Ronald*,

1 Knapp, 259. The goods of a bankrupt *all over the world* are vested in the assignee. POLLOCK, B., in *Armani v. Castrigue*, Law Jour. 1845, vol. 14, part 2, p. 38. Justice requires that the operation of the discharge be as extensive as that of the assignment.

John Young, for the plaintiffs, cited as to the question of revival of the debt by a promise to pay, *Hill v. Kendall*, 25 Vt. 528; *Barlow v. Bellamy*, 7 Vt. 54; *Evans v. Corey*, 29 Ala. 99; *Dearing v. Moffit*, 6 Ala. 776. The debt contracted and payable in Canada was not discharged. Insolvent laws of one State cannot discharge contracts of citizens of other States, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where citizens of such other States voluntarily become a party to the proceedings, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no legal default. *Sturgis v. Crowninshield*, 4 Wheat. 122; *M'Millan v. M'Neill*, 4 Wheat. 209; *Baldwin v. Hale*, 1 Wall. 223. A bankrupt law does not discharge foreign contracts *without the positive mention of such contracts*. *Suydam v. Broadnax*, 14 Pet. 75; *Reinsdyk v. Kane*, 1 Gal. 371. See also *Sawyer v. Marsh*, 10 Met. 594; *Clark v. Hatch*, 7 Cush. 455; *Fessenden v. Willey*, 2 Allen, 67; *Dinsmore v. Bradley*, 5 Gray, 487. Notice is essential, and notice cannot be given to the foreign creditor for want of jurisdiction. *Hawley v. Hunt*, 27 Iowa, 303; *Pratt v. Chase*, 44 N. Y. 597; *Soule v. Chase*, 39 N. Y. 342; *McMenomy v. Murray*, 5 Johns. Ch. 435. The validity, extension, performance and release of contracts are determined by the law of the place of the contract. *Harrison v. Edwards*, 12 Vt. 648; *Peck v. Hibbard*, 26 Vt. 698; *May v. Breed*, 7 Cush. 15; *Lung v. Hammond*, 40 Me. 204; *Potter v. Brown*, 5 East, 124; Story Conf. of Laws, ss. 340, 343. It is equally well settled that the discharge of a contract by the laws of a place where it was not made or to be performed will not be a discharge in any other country. Douglas Rpt. 110; 2 Kent, 418; *M'Millan v. M'Neill*, 4 Wheat. 209; *Lizardi v. Cohen*, 3 Gill, 430; *McMenomy v. Murray*, 3 Johns. Ch. 435. The doctrine of

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Ogden v. Saunders, 12 Wheat. 213, is that a discharge under the bankrupt laws of one country does not affect contracts made or to be executed in another. 2 Kent, 517; *Greenwood v. Curtis*, 6 Mass. 358, 378; *McIntyre v. Parks*, 3 Met. 207.

The opinion of the court was delivered by

ROWELL, J. These cases were heard together. They are alike in legal substance, except that in the McDougall case there is a question of a new promise, which we dispose of *in limine* by saying that no clear, distinct, and unequivocal promise is found, which is essential to the revival of a debt that is barred by a discharge in bankruptcy. *Allen & Co. v. Ferguson*, 18 Wall. 1. Indeed no promise whatever to pay is found, but only an attempt to compromise shown.

The main question is this: Does a discharge under the United States Bankrupt Act operate in the courts of this State to bar the enforcement of a debt provable under said act, but contracted and payable in Canada by a person resident in this State to a person resident in Canada, who neither proved his debt in bankruptcy, nor in any way became a party to the proceedings, nor had any personal notice thereof? This is an important question, and has been twice argued before the full Bench, and has received our careful consideration.

Section 5119, U. S. Rev. Sts., provides, that "a discharge in bankruptcy duly granted shall . . . release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy." Section 5019 provides for giving notice of the institution of proceedings to all creditors upon the schedule filed with the debtor's petition, or whose names may be given to the register in addition by the debtor. Upon application for a discharge, notice is to be given to all creditors who have proved their debts. Sec. 5109.

Some things connected with this subject may be regarded as settled. And in the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country; and that such a discharge, if it releases the debt or liability, and does not merely interfere with the remedy, or course

of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries. *Peck v. Hibbard*, 26 Vt. 698 ; Story Conf. Laws, ss. 385, 388 ; BOVILL, C. J., in *Ellis v. M'Henry*, L. R. 6 C. P. 228.

Secondly, as a general proposition, it is also true that a discharge under a foreign bankrupt law is no bar to an action in the courts of another country on a contract made and to be performed there. *M'Millan v. M'Neill*, 4 Wheat. 209 ; *Smith v. Buchanan*, 1 East, 6 ; *Ellis v. M'Henry*, L. R. 6 C. P. 228. This is because of want of jurisdiction in the court granting the discharge, so that the debt or liability is not thereby released.

But it is contended on the part of the defendants, that a discharge under the bankrupt law of any country is a bar in the courts of that country to all debts and liabilities provable under the law, wherever contracted or to be performed ; that by resorting for the enforcement of his debt to the courts of the country granting the discharge, the creditor waives his extra-territorial immunity, subjects himself to the *lex fori*, and cannot deny the effectiveness of the discharge against him. And this seems to be the doctrine in England, though we think that none of the cases to which we have been referred go to the full extent of holding it, as none of them appear to be cases in which the liability was contracted or to be performed in countries in no wise subject to British rule. For it is important to be remembered in this connection, that for the purposes of the Imperial Bankrupt Act, the British Dominions form one country or law-district,—Dicey's *Law of Domicil*, 355 *et seq.* ; and that, in case of the Legislature of the United Kingdom making laws that will be binding upon her colonies and dependencies, a discharge in the colonies or in the mother country may by the Imperial Legislature be made a binding discharge in both, whether the debt or liability arose in one or the other, and that a discharge created by an act of the English Parliament would be clearly binding on the English courts, and that they would be bound to give effect thereto. *Ellis v. M'Henry*, L. R. 6 C. P. 228.

Armani v. Castrique, as reported in 13 M. & W. 443, was a mere question of pleading, and the effect of an English certificate in an English court as against a foreign creditor was not involved, though some discussion on that subject incidentally arose between the court and counsel during the argument, when POLLOCK, C. B., said that an English certificate was a discharge as against all the world in the English courts. And he put it on the ground that the goods of the bankrupt all over the world were vested in the assignee, and that it would be manifest injustice to take the property of the bankrupt in a foreign country, and then allow a foreign creditor to come and sue him in England. *Edwards v. Roanid*, 1 Knapp, 259, came up on appeal from the Supreme Court of Calcutta. It was an action of general assumpsit. Plea, discharge in bankruptcy in England. Replication, that the cause of action accrued in Calcutta, where the appellees were domiciled, and that they had no notice of the proceedings in bankruptcy. *Held*, that the certificate was a good bar. But Calcutta, as shown by the case, was "a place governed by and subject to the Laws of England." *The Royal Bank of Scotland v. Cuthbert*, 1 Rose, 462, was an action in the Court of Sessions in Scotland, and holds that an English certificate is a bar in the Scotch courts to a debt contracted in Scotland. And in *Sidaway v. Hay*, 3 B. & C. 12, it was held that a debt contracted in England by a trader residing in Scotland was barred by a discharge under a sequestration in Scotland issued in conformity to the 54 Geo. 3, in the same manner as debts contracted in Scotland. These cases simply give effect to Imperial legislation. *Odwin v. Forbes*, 1 Buck, 57, was a suit instituted in the Dutch Colonial Court of Demerara, for the recovery of the balance of an account for sugars consigned to and received by the defendant and his partner in London, and the defendant pleaded his discharge in bankruptcy in England. The Colonial Court held the certificate a discharge of the debt, putting the case mainly, if not wholly, on the grounds of comity and reciprocity which were shown to exist between England and Holland, and that the effect of the certificate ought, in justice, to be co-extensive with the assignment, and that, if foreign courts allowed the assignees under an English commission to strip the

debtor of his foreign property by giving effect to the assignment in their jurisdiction, they were bound in justice to give equal effect to the certificate, and not leave the debtor liable to actions by foreign creditors. From this judgment the plaintiffs appealed to the King in Council, and the case came on to be heard on appeal at the Cock Pit, on Saturday, 31st May, 1817, when judgment was affirmed; but on what ground does not appear, as no opinion of the English court is given. Demerara is a part of British Guiana, the government of which is vested in a governor appointed by the British Crown, and a Court of Policy, originally instituted by the Dutch in 1773 for Demerara, 11 Enc. Brit. 251; and whether this case is to be regarded as merely giving effect to Imperial legislation or not, it does not seem to be much authority for the doctrine that an English certificate in an English court is a bar to a debt wherever contracted, but involved rather the question of whether the Colonial Court would give effect to an English certificate. We have examined some English cases to which we have not been referred, and among them is *Ellis v. M'Henry*, L. R. 6 P. C. 228, in which it was held that a discharge from a debt or liability under a bankrupt act of the Imperial Parliament, is a discharge from such debt or liability in the courts of any country forming part of the British Dominions.

But, without further consideration of the English cases, we think it may be said that the defendant's contention is in accordance with the English rule. Recognitions of that rule are found scattered through the English reports and text books. Dicey's Law of Domicile, Rule II. 355. But it seems to rest largely on the ground put by POLLOCK, C. B., in *Armani v. Castrique*, namely, the universal effect there given to an assignment in bankruptcy. For it is the settled law of England that an assignment under the bankrupt law of a foreign country passes all the personal property of the bankrupt situate, and all debts owing, in England, and that the attachment of such property by an English creditor, after bankruptcy, with or without notice to him, is invalid to overreach the assignment. And the same doctrine holds there under English assignments as to personal property and

debts of the bankrupt in foreign countries. And, upon principle, it is said that all attachments made by foreign creditors in foreign countries, after such assignments, ought to be held invalid; and that, at all events, a British creditor will not be permitted to hold the property acquired by a judgment under any attachment made in a foreign country after such assignment. Story Conf. Laws, s. 409. The same doctrine obtains in France and Holland. Story Conf. Laws, s. 417. But the ubiquity of the operation of assignments under foreign bankrupt laws has always been denied in this country, and such assignments are not permitted to prevail against a subsequent attachment of the bankrupt's effects found here. Our courts will not subject citizens to the inconvenience of seeking their dividends abroad when they have the means of satisfying their demands at home. *Booth v. Clark*, 17 How. 322, and cases *passim*. The law of Germany is the same. Whart. Conf. Laws, s. 844.

The wording of our Bankrupt Act is certainly broad enough to cover foreign debts, for the bankrupt is to be released from *all debts which were or might have been proved against his estate*. But is the act to be construed as intended to include foreign contracts, they not being particularly mentioned therein? Not if we adopt the rule laid down in *Suydam v. Broadnax*, 14 Pet. 67, in these words: "And it may be laid down as a safe proposition, that a statute discharging contracts or denying suits upon them, without the particular mention of foreign contracts, does not include them." "*Ratio est, quia statutum intelligit semper disponere de contractibus factis intra et non extra territorium suum.*" In *M'Menomy v. Murray*, 8 Johns. Ch. 435, Chancellor KENT adopts the same rule, and says: "A bankrupt or an insolvent act ought not to be presumed to have been intended to reach foreign contracts *unless it be so declared.*" But in *Murray v. DeRottenham*, 6 Johns. Ch. 52, which was concerning the same subject-matter as *M'Menomy v. Murray*, he held this language: "But I do not apprehend that we are to require an express declaration of the legislature that foreign creditors are included in the operation of a bankrupt law, when the language of the statute is otherwise sufficiently general and compre-

hensive, and when the evident policy of the law is to embrace all debts that can be proved under the commission, and to give the unfortunate merchant who conducts himself fairly new credit in the commercial world and new capacity for business." But in *Reimsdyk v. Kane*, 1 Gal. 371, Judge STORY adopted and applied the rule in *Suydam v. Broadnax*. We think this the true rule to be adopted in construing this class of statutes, rather than to impute to the Legislature an intention to include matters beyond its jurisdiction.

In *Penniman v. Meigs*, 9 Johns. 325, a discharge under the insolvent law of New York was held to bar a suit on a promissory note given in Connecticut to the plaintiff resident in Rhode Island, who did not assent to the proceedings nor receive any dividend from the defendant's estate. The case was put on the ground that the statute was peremptory and binding on their courts, and that they were bound thereby to treat the discharge as a bar to all suits brought there on antecedent contracts wherever made. It will be seen hereafter that this case is opposed to the whole current of American decision, State and Federal; and in *Hicks v. Hotchkiss*, 7 Johns. Ch. 312, Chancellor KENT refers to it as overruled by *M'Millan v. M'Neill*, 4 Wheat. 209. Going upon the ground of *Penniman v. Meigs*, and referring to it as a well-considered case and "much in point," it was held in *Murray v. De Rottenham*, that a discharge under the United States Bankrupt Act of 1800 was a bar to a debt provable under said act, though contracted and payable in Germany. But the authority of this case is very much shaken by the overruling of the case on which it is based; and we think it runs counter to the great current of American cases.

In this connection we refer to *M'Menomy v. Murray*, and remark that that case is reconcilable with *Murray v. De Rottenham*, only on the ground that in the former the Chancellor was speaking of an *absolute* discharge, effective everywhere, as distinguished from a mere denial of remedy to foreign creditors in the courts of the country granting the discharge.

In *Pattison v. Wilbur*, 10 R. I. 448, effect was given to an American certificate against foreign creditors, on the authority of *Pen-*

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niman v. Meigs, Murray v. DeRottenham, and *In re Zarega*, 4 Law Reporter, 480 (A. D. 1842), which last case we have not seen.

But this court has held in *Bedell & Wardner v. Scruton*, 54 Vt. 493, that a discharge under our insolvent law is no bar to a suit brought here for the enforcement of a debt contracted in this State by a person resident here to a person resident in New Hampshire, who did not prove his debt in insolvency, nor in any way become a party to the proceedings. And this is now the well-settled doctrine, even though the contract by its terms is to be performed in the State where the discharge is granted. *Baldwin v. Hale*, 1 Wall. 223; *Kelly v. Drury*, 9 Allen, 27.

But it is said that these cases, and especially the cases in the Supreme Court of the United States, go upon constitutional rather than jurisdictional grounds. And this is true to some extent. But some of them do not discuss, and none of them exclude, the non-jurisdictional ground, while many of them go solely upon that ground. Thus, in *Baldwin v. Hale*, "Insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceedings, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no legal default." In *Bedell & Wardner v. Scruton* this court said that it was a question of citizenship, and that State courts and State laws are powerless to affect the rights of non-resident creditors by any jurisdiction they may have or exercise over the person of the debtor or by any proceedings *in rem* affecting the debt. In *Hawley v. Hunt*, 27 Iowa, 303, Judge DILLON says: "A creditor cannot be compelled by a State of which he is not a citizen or resident to become a party to insolvency proceedings therein. Such proceedings are judicial in their nature, so that jurisdiction over the person of the creditor is essential. Notice is requisite to jurisdiction in such cases, and can no more be given in insolvency proceedings than in personal actions when the party to be notified resides out of the State; and hence a discharge under a State insolvent law will not and can-

not discharge a debt due to a citizen of another State, unless the latter appears and voluntarily submits to the jurisdiction of the court by becoming a party to the proceedings or claiming a dividend thereunder." In *Pratt v. Chase*, 44 N. Y. 597, it is said that "as to creditors of the insolvent who are not citizens of the same State where the discharge is granted, the want of binding force to defeat the obligation of a contract is founded upon want of jurisdiction over such creditors."

The question of waiver of extra-territorial immunity by suing in the courts of this State, although not expressly ruled in *Bedell & Wardner v. Scruton*, was directly involved in it, and that decision amounts to an absolute denial of any such waiver. But that question was expressly ruled in *Soule v. Chase*, 39 N. Y. 342, in these words: "The plaintiff in the case before us being a non-resident when the debt was incurred and when the insolvent proceedings were commenced, was not divested of his extra-territorial immunity by resorting to a court of this State, and the discharge is not available against him." HUNT, C. J., however, dissented, and said all there is to be said on the other side. In *Kelley v. Drury*, 9 Allen, 27, it is said: "This court has not been disposed to make any discrimination in favor of our citizens in proceedings against them in the State courts in distinction from proceeding in the courts of the United States." In a very recent case in Maine, *Hills v. Carlton*, 15 Reporter, 398, this point is ruled thus: "This debt not being discharged, the plaintiffs have an equal right to enforce the payment of their debt with other citizens having claims to enforce. The courts in the cases cited like the present have held that a discharge shall not be a bar. An absolute discharge of a debt and a prohibition against all remedies for its enforcement, would seem to differ little in their consequences to the creditor. The discharge affords no defence to the plaintiff's claim."

But it is said that while this may be true as to discharges granted under State insolvent laws, it is not true as to discharges granted under the National Bankrupt Act. But wherein lies the distinction in principle? But it is said that under the National Bankrupt Act all creditors, foreign as well as domestic, are to be

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notified. But of what avail is notice to foreign creditors? They are beyond the jurisdiction, and out of reach of process. Are their debts to be invalidated by the judgment of a court that has neither jurisdiction of them nor of their debts? If so, upon what principle? Judge STORY, in *Reimsdyk v. Kane*, 1 Gal. 371, says: "The general rule is, that a discharge of a contract according to the *lex loci contractus* is good everywhere. The rule is founded upon public convenience and the comity of nations. It would seem to follow from the same principle that a discharge under the municipal laws of a foreign state should not affect the validity of such a contract." And he goes on to say: "I cannot but presume that the judicial tribunals of Rhode Island, in all cases where a different rule were not prescribed by their own legislature, would adopt the *jus gentium* as to the construction and validity of foreign contracts sought to be enforced by their process. If, therefore, the words of the act of insolvency do not necessarily extend, as I think they do not, to foreign contracts, I can entertain no doubt that they would adjudge them according to that equity which the usage of nations had settled and applied. I hold it to be a legitimate inference from doctrines already established, that a contract made in a foreign country, and to be governed and discharged by its laws, cannot be discharged by a mere regulation of another country to which the parties have not bound themselves to submit. . . . A discharge under an insolvent act goes *au fonds* to the merits and not *a l'ordre judiciaire* to the process or remedy."

The distinction as to the forum in which the party elects to institute his action, may be very material in regard to all that is mere remedy. But when the question goes to the merits, the *lex loci* should govern, unless the *lex fori* expressly forbids it. The rule is thus stated in the very recent case of *Pritchard v. Norton*, 106 U. S. 124: "The principle is, that whatever relates to the remedy and constitutes part of the procedure, is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties as growing out of the contract itself or inhering in it or attaching to

it, is governed by the law of the contract." There is no express prohibition in the law of this State nor of the United States forbidding the *lex loci* to govern, and we fail to see on what principle these cases should be excepted from the general rule. We think the principle of the case in the 54th Vt., and other similar cases, is decisive of the cases before us in favor of the plaintiffs; that that principle is as applicable to a discharge in bankruptcy as to a discharge in insolvency. And this was the opinion of the late Chief Justice REDFIELD, as shown in his note to *Baldwin v. Hale*, 3 Am. Law Reg. N. S. 470, wherein he says: "The contrast between State insolvent laws and a general bankrupt law of the United States consists chiefly in this, that one is confined to the particular State, and the other operates throughout the nation. And one residing without the State, having a claim against the debtor who has obtained his discharge under the insolvent laws of a State, stands in the same relation to the discharge that a foreign resident does to a discharge obtained under a general bankrupt law." We regard this as sound doctrine, and fully in accord with fundamental principles of the law, from which no departure should be made. Though this precise question does not appear to have been ruled by the Supreme Court of the United States, we think it safe to say that no decision of that court gives countenance to a contrary doctrine.

Judge WHEELER has favored us with the statement of a case that came before Judge BLATCHFORD in the early part of 1878, which involved the question of jurisdiction over foreign creditors. A firm in New York was composed of residents of New York and a resident of Canada. The Canadian member was indebted to other residents of Canada, and the firm was indebted to residents of New York. The Canadian creditors came into New York and attached the property of the Canadian member of the firm there. Proceedings in bankruptcy were instituted against the firm in season to avoid the attachment, provided there could be an adjudication of bankruptcy, and such proceedings would reach the property of the individual partners as well as of the firm. U. S. Rev. Sts. s. 5121. The Canadian creditors appeared and objected to an adjudication of bankruptcy of the firm, or of

any more than the resident members of it, on the ground that there was no jurisdiction of the Canadian member. The resident creditors insisted that the court had jurisdiction of the firm as such, and of these Canadian creditors, because they had come into the jurisdiction and appeared as parties to the proceedings. To this latter claim it was replied that they did not appear to participate in the proceedings nor the avails thereof, but only to object to having the property involved on which they had claims. Judge BLATCHFORD held that the court had no jurisdiction of the Canadian partner nor of the Canadian creditors, either on account of their coming into the jurisdiction to attach the property of that partner, or of their appearing as parties to the proceedings for the purpose of objecting to an adjudication that would involve the property they had attached, and the adjudication was limited accordingly.

In the cases at bar, the court granting the discharge in bankruptcy had jurisdiction neither of the plaintiffs nor of their debts. The obligatory force of said debts, therefore, is in nowise impaired by said discharge in the country where they were contracted and payable. There is no express, and we think no implied, enactment, State or National, forbidding the courts of this State to afford the plaintiffs a remedy for the enforcement of their debts here. A discharge under bankrupt or insolvent laws, unlike the bar of statutes of limitations, goes to the merits and not to the process or remedy. The *jus gentium privatum* is, that contracts valid in the place where they are made and to be performed are to be held valid everywhere, by the tacit or implied assent of the parties (*Pritchard v. Norton*), a rule founded not only in the convenience but the necessities of nations. On what principle, then, shall we refuse these plaintiffs a remedy in our courts?

Judgments reversed, and judgments on the reports for the plaintiffs.

ROYCE, C. J., and REDFIELD, J., dissented.

G. S. GUERNSEY v. WM. M. KENDALL AND WIFE.*

[IN CHANCERY.]

Mortgage. Owner of Equity of Redemption when not entitled to be Subrogated to Rights of Mortgagee. Presumption.

1. The bill alleged that the orator purchased an equity of redemption,—a farm covered by several mortgages; that the defendants owned two, the second and fourth, on the premises; that, as they had foreclosed their first, and the decree about becoming absolute, the orator paid the amount thereof; that they had purchased the first mortgage on the farm, and the orator having paid them therefor took an assignment to himself; that he had bought the third mortgage, and it had been assigned to him; and prayed that the defendant's repay to the orator the amount of the decree, and of the first mortgage, so paid to them, and, also, of the third mortgage, or be foreclosed. *Held*, on demurrer to the bill, that it should be dismissed; that the orator took only the rights of the mortgagor; and that by payment of a part of the incumbrances, he could not be subrogated to the rights of the incumbrancer whose debts he had paid, and by such subrogation defeat the liens of other incumbrancers whose rights are prior in time to his conveyance of the equity of redemption; and there would be the same result if the bill were amended stating that the orator held the premises in trust for the benefit of a fifth mortgagee.
2. The purchaser of an equity of redemption by deed without covenants takes the estate charged with the payment of the mortgage debts; and, it is presumed, in the absence of any special contract, that what he paid, or agreed to pay, was the price less their amount.

HEARD on demurrer to the bill, May Term, 1880, Windsor County, BARRETT, Chancellor. Demurrer sustained and bill dismissed. The facts are stated in the opinion of the court, except the orator in his brief, if the decision of the court was against him, asked leave to amend his bill, by stating that the conveyance of the equity to him was by quit-claim deed in common form; that he had no interest in the farm, and that he held the same in trust for the benefit of a fifth mortgagee.

* Heard at General Term, 1881.

J. J. Wilson, for the orator.

The principle is well settled that if a subsequent incumbrancer or one who has acquired a legal or equitable interest in mortgaged premises, pays off a prior incumbrance in order to protect or preserve his interest in the premises, such payment will operate as an assignment of such prior mortgage, and the person so paying can keep it alive and set it up as against intervening incumbrances. *Millspaugh v. McBride*, 7 Paige, 509; *Card v. Putmon*, 7 Me. 102; *Thompson v. Chandler*, 7 Me. 377; *Pool v. Hathaway*, 22 Me. 85; *Gibson v. Crehore*, 3 Pick. 475; s. c. 5 Pick. 146; *James v. Morey*, 2 Cow. 284; 1 Jones Mort. 869; *Downer v. Wilson*, 38 Vt. 1; *Payne v. Hathaway*, 3 Vt. 212; *Walker v. King*, 44 Vt. 601; s. c. 45 Vt. 525; *Spaulding v. Crane*, 46 Vt. 292.

The orator was the owner of the homestead interest; and as such owner he had all the rights therein vested in his grantors. The homestead was surety for the first mortgage debt to defendants. The wife's right to all the rights of suretyship is unquestioned. But a surety is entitled to be subrogated to the rights of the creditor. *Stevens v. Gould*, 26 Vt. 676; *Thons v. Reardon*, 11 Md. 465; *Ayers v. Husted*, 15 Conn. 504; 1 Lead. Cas. Eq. 158; *Stevens v. Goodenough*, 26 Vt. 685; *Lamb v. Mason*, 45 Vt. 500.

The orator can stand on the Cardell mortgage. *Bullard v. Leach*, 27 Vt. 491; *Wilson v. Burton*, 52 Vt. 394; *Black v. Gorman*, 5 Serg. & R. 36; *Johnson v. Harden & Avery*, 45 Iowa, 680; *Belmont v. Coman*, 22 N. Y. 438; *Trotter v. Hughes*, 12 N. Y. 80; *Tainter v. Hemingway*, 22 N. Y. 458.

Norman Paul, and *French & Southgate*, for defendants.

The orator voluntarily purchased of Steele his equity of redemption, subject to all the incumbrances. He thus assumed all the liabilities and sustained the same relation to the several mortgages that the mortgagor did. It thus became his duty to pay them; and whenever he made a payment of one, it thereby became extinguished and relieved the estate of so much of the burden resting upon it. 1 Wash. Real Pr. 563, 567; *Devereaux & Meserve v. Fairbanks*, 52 Vt. 587; *McDaniels v. Lapham*, 21 Vt. 222; *Popkin v. Bumstead*, 8 Mass. 491; *Marsh v. Pike*, 10

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Paige, 595; *Townsend v. Ward*, 27 Conn. 610; *Thompson v. Thompson*, 4 Ohio, 833; *Warring v. Ward*, 7 Vesey, 331; *Russell v. Piston*, 7 N. Y. 171.

The presumption is that he assumed the mortgage debts. 1 *Hilliard Mort.* 848, 357; 2 *Story Eq. s.* 1248; *Halsey v. Reed*, 9 Paige, 445, *Lechmere v. Charlton*, 15 Ves. 193; *Russell v. Piston*, 7 N. Y. 171; *Blyer v. Monholland*, 2 Sandf. Ch. 478; 2 *Lead. Cas. Eq.* 97, 230; *Eaton v. Simonds*, 14 Pick. 492; 1 *Jones Mort. ss.* 858, 864; *Gill v. Lyon*, 1 Johns. Ch. 446; *Russell v. Kinney*, 1 Sandf. Ch. 34.

The opinion of the court was delivered by

ROYCE, J. On the 20th day of May, 1867, one Daniel H. Steele was the owner of a farm in Warren, Vt. On the same day he executed a mortgage of the farm to the town of Warren to secure the payment of a note given by him for the sum of \$300. On the 29th of July, 1871, the said Steele, being indebted to the defendant Roxana Kendall, in the sum of \$1240, executed his note for that sum payable to her on demand with annual interest, and to secure the payment of said note he, with his wife, executed a mortgage to her of the same farm.

On the 2d day of November, 1871, the said Steele executed a mortgage of the same farm to James Cardell to secure the payment of two notes amounting to the sum of \$116.77. On the 8th day of April, 1872, the said Steele, being indebted to the defendant Roxana in the further sum of \$350, executed his note payable to her for that amount and a mortgage of the same farm to secure its payment.

On the 24th day of April, 1877, the orator bought said premises subject to said incumbrances (except the homestead interest of the wife of said Steele,) and took a conveyance thereof which was duly recorded. On the 1st day of May, 1878, all of said notes secured by said mortgages remaining unpaid, the said Roxana, joining with her husband William M., the other defendant, brought a petition to foreclose the mortgage given to the said Roxana on the 29th of July, 1871, to secure the payment of the note for \$1240, and made the orator, James Cardell, Daniel H. Steele and

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his wife parties defendants. The petitioners obtained a decree of foreclosure against the defendants, and the time for redemption was fixed at or about the 10th of December, 1879. After said petition for foreclosure had been brought, the said Roxana bought or paid the note given by Steele to the town of Warren, and secured by the mortgage executed on the 20th day of May, 1867. On the 24th day of November, 1879, the orator bought of the said Steele and wife their homestead interest in said farm, and took a conveyance thereof which was duly recorded. On the 3d day of December, 1879, and after said decree of foreclosure had been obtained, the orator bought of James Cardell the notes and mortgage which were given to him by Steele on the 2d day of November, 1871, and they were duly transferred to him by said Cardell.

The orator, on the 8th day of December, 1879, for the alleged purpose of protecting his interest in said farm, paid to the said Roxana the sum of \$2113.24, being the amount of said decree and interest at that time, thereby redeeming said premises from said decree; and on the same day, for the like purpose, paid to her the amount, being \$385.89, then due on the note given by Steele to the town of Warren, and secured by the mortgage dated May 20th, 1867, and the note was delivered to him. This bill is brought to compel a repayment to the orator of the sums so paid by him to the said Roxana, and prays that in default of such repayment the defendants may be foreclosed of all equity of redemption in the premises, and for such further relief as the nature and circumstances of the case may require.

If the mortgage had paid the incumbrances which were paid by the orator, it would have been the payment of his own debts which he was obliged to pay to relieve his estate. The orator, by the purchase of the equity of redemption acquired the estate of the mortgage. He had no greater estate to convey than the right to pay off the incumbrances then resting upon the premises, and by so doing his grantee would become the owner of the estate. In the absence of an agreement to pay incumbrances it is optional with the grantee of an equity of redemption to pay them or not. If he would preserve his estate in the premises upon

which the incumbrances rest, he must pay them; he may give up the property in satisfaction of the liens upon it. He cannot by the payment of a part of the incumbrances be subrogated to the rights of the incumbrancers whose debts he has paid, and by such subrogation defeat the liens of other incumbrancers whose rights are prior in time to his conveyance of the equity of redemption. The mortgaged premises remained a security for the debts which the mortgages were given to secure after the equity of redemption had been conveyed to the orator the same as before; and inasmuch as the orator has only the interest which the mortgagor had in the mortgaged premises, it is difficult to see how he can be subrogated to any rights that the mortgagor could not have been subrogated to.

One who purchases an equity of redemption by a deed without covenants takes the estate charged with the payment of the mortgage debts, and it is presumed, in the absence of any special contract, that the amount paid or agreed to be paid was the price of the property purchased less the amount of the mortgages, and it would be for the purchaser and not the seller to discharge the incumbrances. 1 Jones on Mortgages, s. 736; *Gayle v. Wilson*, 5 Rep. 667. The orator alleges that he bought said premises subject to said incumbrances; and it was held in *Sweetser v. Jones*, 35 Vt. 317, that where one purchases land expressly subject to a mortgage the land conveyed is as effectually charged with the incumbrance of the mortgage debt as if the purchaser had expressly assumed the payment of the debt, or had himself made a mortgage of the land to secure it.

The purchaser of a mere equity of redemption in the absence of an agreement to pay the mortgage debt is not personally liable for it; the mortgage debt however, remains an incumbrance upon the estate. 1 Jones on Mortgages, s. 738. The orator in making the payments to the defendants was paying debts which he was obliged to pay to redeem the estate, and it was optional with him to redeem it or not. After having elected to redeem a court of equity will not aid him in recovering back the money that he has so paid. If such a decree should be made as the orator has prayed for and the defendants should elect to pay back the money received from the orator, the parties would then stand relatively

to each other and the estate the same as if no proceedings had been had to foreclose the mortgage ; if they should elect not to pay back the money, they are to be deprived of the security given by virtue of their second mortgage, and that, too, by the act of the party who executed the mortgage in conveying away, without the privity of the mortgagee, his equity of redemption. It was held in *Wade v. Howard*, 6 Pick. 492, that the purchaser, under an execution against the mortgagor, of the right to redeem from two mortgages, since he acquires only the interest of the mortgagor, cannot, upon taking an assignment of the first mortgage, set it up as a source of title against those who claim under the second mortgage.

The facts stated in the orator's bill do not make a case that entitles him to be subrogated to the rights of the defendants under their first mortgage so as to enable him to defeat the defendants' security under their second mortgage. The orator, in making the payments that he did make, as we believe, made them upon the understanding and belief that they were payments he was bound to make to relieve his estate. They could not have been made with the expectation that the order in which he might pay the incumbrances resting on the property would furnish occasion for invoking the doctrine of equitable subrogation to enable him to squeeze out other incumbrances of equal validity with those he had paid. The amendment the orator proposed to make to his bill, if allowed, would not aid or strengthen his claim. The fact that he did not pay anything for the transfer to him of the equity of redemption, and took the title for the benefit of a fifth mortgagee, would lead to the belief that the consideration for the transfer, as understood by the parties to it, was that the orator should pay off the incumbrances resting upon the property.

The decree of the Court of Chancery dismissing the bill is affirmed and cause remanded.

SARAH M. WADE v. J. F. HENNESSY, D. C. LINSLEY,
BURLINGTON & LAMOILLE R. R. CO. & OTHERS.

[IN CHANCERY.]

Mortgage. Foreclosure. Railroad. Eminent Domain.

1. A railroad company by a warrantee deed from a mortgagor of lands for railroad purposes takes only the right and title of the mortgagor, the mortgagee being ignorant of the transaction; and in a foreclosure proceeding the company can make only the same defence that the mortgagor could.
2. And this is so although the railroad could have taken the land under the exercise of the right of eminent domain.
3. And, although the mortgagor paid the consideration received for the deeds to the mortgagee.
4. R. L. ss. 3367, 3369, when the owner of lands condemned for railroad purposes is unknown, construed.

FORECLOSURE of mortgage. Heard on bill, answer and master's report, February Term, 1882, Orleans County. REDFIELD, Chancellor, decreed a foreclosure, fixing the time and amount of payments. The facts are stated in the opinion.

Brigham & Waterman, for defendants.

Linsley was the agent of the R. R. Co. The case stands as though Hennessy had dealt with the company. A railroad company may take land by purchase for the construction of its road. R. L. s. 3356. And in such cases the rights of the company in the construction of their road are the same as though they had taken the land by compulsory process. *Norton v. Vt. Cen. R. R. Co.*, 28 Vt. 99; *Troy & Boston R. R. Co. v. Potter*, 42 Vt. 265. The aid of commissioners cannot be invoked unless the parties fail to agree. R. L. s. 3359. In case of such failure, notice need be given to the occupant or owner, only. R. L. ss. 3360, 3363. In this case, Hennessy, with whom the contract was made, was both the owner and occupant, and the very person with whom

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the company was required by statute to deal. By the general current of authorities, the mortgagor in possession is regarded as the owner, whether there has been a breach or not; and in the absence of any explicit statutory requirement, a settlement with him, and payment, in a case of this kind, is conclusive on the mortgagee, even if not notified. 4 Kent, 160; *Hooper v. Wilson*, 12 Vt. 695; *Thompson Highways*, 191; *Contant v. Catlin*, 2 Sandf. Ch. 485; *Farnsworth v. The City of Boston*, 126 Mass. 1; 2 Wash. Real Prop. marg. p. 548; *City of Norwich v. Hubbard*, 22 Conn. 587; *Whiting v. City of New Haven*, 45 Conn. 304.

L. H. Thompson, for oratrix, cited *Hagar v. Brainerd, et al.*, 44 Vt. 300, and argued substantially as the court hold.

The opinion of the court was delivered by

Ross, J. This is a petition for the foreclosure of a mortgage. It is defended by D. C. Linsley and the Burlington & Lamoille Railroad Company. Subsequently to the execution of the mortgage, the defendant company located its road across the mortgaged premises, and constructed the same under a contract with Mr. Linsley by which he was to pay the land damages, construct and operate the road until the company paid him for so doing. In the execution of this contract, Mr. Linsley took from the mortgagor warrantee deeds, to himself, of that portion of the mortgaged premises required for the construction of the railroad, it being stated in the deeds that the land conveyed was to be used for railroad purposes. His agent, the engineer, who conducted the negotiations and paid the consideration for the deeds to the mortgagor, knew of the existence of the mortgage, which was duly recorded. He testified, and so the master has found the fact to be, that the agent did not request the mortgagor to have the consideration applied in reduction of the mortgage debt, but on the representations of the mortgagor, that his place was pretty nearly paid for, took his chances. The mortgagor paid the money received for the deeds conveying the right of way with other money to the oratrix, who applied the same in reduction of the mortgage debt. The oratrix, who was during all this time the owner of mortgage

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notes, resided in Boston, and had no communication with Mr. Linsley, or the railroad company, nor with any one acting in their behalf, and did not know, until long after it was done, that the railroad was constructed across the mortgaged premises, nor that the mortgagor had conveyed a portion of the same to Mr. Linsley for that purpose, nor that the consideration of the same had been paid to her by the mortgagor. The mortgagor is now insolvent, and the mortgaged premises now worth less than the amount due on the mortgage. These are the facts substantially as they appear in the master's report, on which Mr. Linsley and the railroad company defend against the foreclosure of the mortgage, as to that portion of the premises conveyed for railroad purposes.

By the warrantee deeds as against the oratrix, Mr. Linsley, and the railroad company under him, took only the title of the mortgagor, and under them can only make the same defence which the mortgagor could have made. He took his chances against the mortgage, and took the covenants of the mortgagor to secure him against any loss resulting from those chances. That those covenants are unavailing, through the insolvency of the mortgagor, is no concern of the oratrix; and the loss, if any, resulting therefrom, is not to be visited upon her. She was not asked to, and did not, guarantee the title of the mortgagor. On the contrary, by the mortgage deed on record undischarged, she warned everybody that it was precarious, and dependant upon the mortgagor's payment of the mortgage debt. That she received from the mortgagor, as his money, the consideration paid for the deeds of the mortgagor, does not affect her right to insist upon the entire mortgaged premises remaining security for that portion of the mortgage debt which remains unpaid. As regards the mortgaged premises, Mr. Linsley and the railroad company stand the same as any purchaser of the equity of redemption of the mortgagor. The purposes for which the purchased equity of redemption in the portion of the premises conveyed were to be used, do not vary the legal relations of the purchaser to the holder of the mortgage debt; nor does the fact that the railroad company, under the exercise of the right of eminent domain, might have taken the oratrix' interest in the mortgaged premises, and thereby obtained an

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unimpeachable title against her. It did not exercise that right, but contented itself with the right it acquired through the deeds to Mr. Linsley as a purchaser from the mortgagor. To the exercise of the right of eminent domain, it is indispensable that compensation be made to the *owner* of the property taken, by the payment of an equivalent in money. Art. 2 of Bill of Rights, p. 32, R. L. Payment to some other person, not the owner, and not entitled to the money, would give the railroad company no right by the exercise of the right of eminent domain, to divert the oratrix' title as mortgagee in the premises. All the provisions of the statute, R. L. ss. 8367 to 8369, relative to securing the title to land condemned for railroad purposes by the exercise of the right of eminent domain, where there are conflicting claims to the title, or the lands taken are encumbered by a mortgage, show that the railroad company, to protect itself by the payment of an equivalent in money for the lands taken, must make all the parties claiming the title parties to the proceedings, and have their respective rights to the money adjudicated, and so give the several parties the right to be heard, and make it sure that the party entitled receives the equivalent in money. Where a railroad company contents itself with acquiring the right to use lands for the purpose of constructing, maintaining and operating its road, by gift or purchase, it must stand like any other donee or purchaser, and protect itself by securing in that way the rights of all legally interested in the property donated or purchased. It takes by the gift or purchase only the rights therein of the donor or vendor. Standing on those rights, Mr. Linsley, and the railroad company through him, have secured only the right to redeem the premises from the oratrix' mortgage thereon, the same right which the mortgagor himself had. If they redeem, doubtless they can be subrogated to the oratrix' right under the mortgage to the whole farm. If they decline to redeem, they must yield to her superior right to the whole mortgaged premises, and seek protection, if at all, by the exercise of the right of eminent domain under the statute against her.

No other error is claimed to exist in the decree of the Court of Chancery. The decree affirmed, and cause remanded.

STATE v. S. S. NICHOLS ; SAME v. WILLIAM H. FLETCHER ;
SAME v. L. F. SHONYO.

Costs.

1. Costs cannot be taxed against a respondent for witnesses summoned against him before the twenty-four hours allowed him by statute to plead have expired.
2. R. L. s. 1641, time allowed respondents to plead, construed.

A question of costs passed up from Caledonia County.

Henry C. Bates, for the State.

George W. Cahoon, for the respondents.

The opinion of the court was delivered by

REDFIELD, J. The respondents were arrested upon the several warrants issued on the information of the state's attorney. Subpoenas were issued and witnesses against the several respondents summoned contemporaneously with the warrants. The respondents called for specification of charges, and twenty-four hours were demanded in which to plead as allowed by the statute. The respondents then severally pleaded guilty to a specified number of offences (of liquor selling), which pleas were accepted by the state's attorney, and no trial had. The court allowed the attendance of the witnesses on the first day before the respondents by the rules of law could be required to plead.

Although the Bill of Rights (Article 10) has more special reference to "high crimes," and does not in all its provisions apply to those minor offences regulated by the Legislature in the exercise of its "police power," yet, as was said by REDFIELD, Ch. J., in *State v. Conlin*, 27 Vt. 323, "the accused is always entitled to a specification and time to prepare his defence"; and the statute provides that "no person shall be compelled to plead . . . until he shall have been furnished a copy at least twenty-four hours." No issue could be joined for the present, unless the respondents elected to waive their legal rights,

which is not to be presumed ; and, *non constat*, that any issue of fact would ever be joined, if the respondents should elect to contest the charges in the several informations. If the respondents had promptly *demurred* to the informations the first moment they could be required to plead, and had been cast in that *issue*, would they be required to pay a horde of witnesses in attendance upon the court days before the accused could be required to plead ? We think it would be without reason or justice. And for the same reason when the respondent is first called to answer the charges, if he concedes upon the record that it is true, or true to such extent that the prosecuting attorney elects to go no further, then no cost of witnesses has accrued in the trial of the cause, and none can properly and *legally* be taxed against the accused. It is said in argument that offenders resort to such measures to evade the law that a prosecuting officer can make no convictions unless "they *first catch* their witnesses and then implead a *respondent*." There are, doubtless, desperate methods resorted to, to violate the statute and evade its penalties ; but still, those accused of crime must be deemed legally innocent until they are *proved* guilty ; and neither penalties nor costs of trial accrue against them, until, according to the forms of law they have been impleaded, and an *issue*, either of law or fact, joined in the cause. If a party summoned witnesses in a civil cause which stood on demurrer, or which by the rules of law could not be tried at that term, or until pleadings had been filed making up an *issue*, the cost of such witnesses could not properly be taxed. And in all criminal proceedings the respondent has a right to know whereof he is accused by a definite statement, and then *time* to prepare and make his defence ; and if a petty penalty is exacted, if cost of numberless witnesses may be incurred before the accused knows whereof he is accused, then a respondent has no way of escape from multiplied penalties in the form of costs, though he confesses the wrong and pays the penalty at the first moment it is exacted. We think the law is not thus defective, if properly administered.

Judgments in the several cases reversed, and the respective sums of \$5.00, \$9.00 and \$12.00 deducted as specified in the exceptions, and the several judgments affirmed in other respects.

TOWN OF BURKE v. TOWN OF WESTMORE.

Pauper. Presumption.

1. Nothing is presumed when the question is, which of two towns shall support a pauper; thus, the report showing that the pauper's father was "*chosen*," but did not show that he "*served*," in certain offices named in the statute, R. L. s. 2811, sub. 5, it will not be presumed that he served in office.
2. R. L. s. 2811, sub. 5, pauper, holding office, construed.

APPEAL from an order of removal of Mrs. Lydia Cook, a pauper. Pleas, that the pauper had no lawful settlement in the defendant town; and that she was unduly removed. Heard on the report of a referee, June Term, 1882, Caledonia County, Ross, J., presiding. Judgment for defendant. The facts are stated in the opinion.

Cahoon & Hoffman, for plaintiff.

Edwards, Dickerman & Young, for the defendant.

The opinion of the court was delivered by

ROWELL, J. The report does not show that John J. Bishop, the pauper's father, had a settlement in the town of Westmore. It appears that he was chosen highway surveyor in 1844; lister in 1845, 1849, 1853 and 1854; and first constable from 1850 to 1854, inclusive; but there is no finding that he *served* in any of those capacities in any of said years except in the capacity of first constable, in 1853. The statute is, that "a person chosen *and serving* two years," etc., shall gain a settlement. R. L. s. 2811, sub. s. V. In the St. of 1817 the wording was, "any person who shall . . . be . . . appointed to *and sworn*," etc. Slade's Sts. 381, No. 3. In 1839 this phraseology was changed to "*chosen and actually serving*." R. S. c. 15, s. 1, sub. s. 5. Thus, before the Revision of 1839, appointment and taking the

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official oath, it seems, were sufficient; but since then actual service in office is requisite. And such service must be shown, and cannot be presumed from the fact of election. There are no equities among towns in the support of paupers, but the liability is imposed by statute, and is matter of strict right; and the party averring a settlement must show everything necessary to the acquisition thereof. It is unnecessary to consider the other questions discussed at the bar.

Judgment affirmed.

H. AND H. E. RANDALL AND OTHERS v. SIAS RANDALL
AND OTHERS.*

[IN CHANCERY.]

*Master's Report Recommitted, but Master dies before further
Proceedings.*

1. The case was referred to a special master under the statute, R. L. s. 724; a report was made, exceptions taken, the case recommitted for further findings; but before there were other proceedings the master died; and the chancellor then overruled the exceptions, and, without noticing the order to recommit, rendered a decree. *Held*, error; that there was nothing for the chancellor to act upon.
2. Special masters, in the finding of facts, are substituted for the court; and their findings, upon legal evidence, are conclusive. They are not required to embody in their report, or return with it, any of the evidence, unless required to do so in the order appointing them, any further than may be necessary to present the legal questions.†
3. R. L. s. 724, special masters in chancery, construed.

BILL in chancery. Heard on bill, answer, replication, master's report and exceptions thereto, June Term, 1881, Caledonia County, Ross, Chancellor. The case was referred, and a report made. The defendant excepted,

* Heard at General Term, 1881.

† See *Sargeant v. French*, 54 Vt. 393, and *Merrill v. R. R. Co.* 1b. 208.—REP.

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“ Because of the admission of parol testimony against defendants’ objection to prove agreement to give up Hadley mortgage and accept another mortgage in payment ; and to the admission of testimony and evidence in all cases where objections were made by defendants’ solicitors as shown by the master’s minutes, which are referred to and made a part of these exceptions ; . . . because it finds certain alleged facts to be proven when in fact there was no evidence before the master tending to prove the facts as found by master.”

The chancellor ordered :

“ The reports in the above cases are recommitted to the master to state definitely what testimony was excepted to under defendants’ first above exception to the acceptance of the report which influenced the finding of any of the facts reported, and what his findings would be if the testimony excepted to was excluded. Also to state what testimony there was before him on which the facts were found, and in regard to which, in the above exceptions, it is claimed there is no testimony. And also to report upon the further requests for special findings by each party hereby committed to him. By the first above instruction the chancellor does not mean that the master should state all the testimony where the objection to the testimony was that the contract was such that it could not be shown by parol testimony because within the statute of frauds, further than to state whether the facts reported are found on parol or written testimony.”

The other facts are stated in the opinion of the court.

M. Montgomery and *H. C. Bates*, for the orators, cited, on the question that the report was insufficient to base a decree on, 5 Mass. 139 ; 7 Mass. 412 ; 8 Vt. 108 ; 6 Mass. 70.

Belden & Ide and *Elisha May*, for defendants.

The opinion of the court was delivered by

ROYCE, J. The above cause and the causes of *A. J. R. Mears v. H. & H. E. Randall et al.* and *A. J. R. Mears and Sias Randall v. H. E. Randall et al.* were referred under the act of 1878 to a special master. The master heard the cases together and made a report in each ; exceptions were filed to the report in each of the cases, which are substantially the same, and requests were

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filed for further and additional findings. When the reports came on for hearing before the chancellor he ordered them recommitted to the master to state definitely what testimony was excepted to under the first exception to the acceptance of the report which influenced the finding of any of the facts reported, and what his findings would be if the testimony was excluded; also to state what testimony there was before him on which the facts were found and in regard to which it was claimed by the exceptions there was no testimony; and to report upon the further requests for special findings by each party. Before any further proceedings were taken the master died, and the chancellor ordered decrees to be made in all the cases upon the report that had been made by the master. In the decretal orders made by him the exceptions to the reports are overruled, but no notice is taken of the previous order made by him that there should be a report made upon the requests for special findings.

The question presented is whether the reports made by the master, taken in connection with the subsequent orders made by the chancellor, furnished a basis upon which final decrees could be made. The decision of the chancellor that further findings by the master were necessary was a judicial determination of that question, and, until reversed or complied with, there could be no complete reports upon which the chancellor could act. The necessity and propriety of the orders were decided by the chancellor upon the hearing, and cannot now be questioned. The act of 1878 (section 724, R. L.), which provides for the appointment of special masters to determine issues of fact in chancery, requires them to make a full report of the facts found by them material to the cause, and to state in their report decisions made as to the admission or rejection of evidence when the party against whom the decision is made so requests in writing. They are to try and determine such issues upon oral testimony and depositions taken in the manner provided in suits at law, and all proper written or documentary evidence, and when their report is filed and accepted the court shall make a decree in the cause. They are not required and the act does not contemplate that they should embody in their report, or return with it, any of the evidence used before them,

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unless required to do so in the order appointing them, any further than may be necessary to present the legal questions made as to its admissibility or materiality. The masters, in the finding of facts, are substituted for the court; and their findings, upon legal evidence, are conclusive.

The chancellor states that to determine the questions raised he carefully examined the quite full minutes of the testimony taken by the master and all the exhibits in the case, but it nowhere appears that all the testimony before the master was reduced to writing, and if it had been, the chancellor could not say how far the findings of the master were influenced by any portion of it, nor how the rights of the parties might be affected by findings upon the requests filed. While we appreciate the commendable endeavor of the chancellor, with such material as was accessible, to make such decrees as should be reasonably satisfactory and thus save further expense to the litigants, it was such a departure from the well-established course of procedure in the trial of chancery causes that it would be a dangerous precedent to give it judicial sanction.

The decree of the court of chancery in each of the cases is reversed, and causes remanded to be proceeded with the same as if no reports had been made by the master.

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T. H. BROWNELL v. TROY & BOSTON RAILROAD COMPANY.

Obstructing Highway. Evidence. Practice.

1. The defendant railroad is liable for injuries sustained by the plaintiff while travelling on a highway, which injuries were caused by its leaving obstructions on the margin of the highway, though it had never been surveyed, but had been used by the travelling public more than twenty years. A highway by dedication may have a margin.
2. If it is claimed that there was no evidence to support the finding of the jury, the question should be presented in the County Court and before judgment on the verdict.
3. On cross-examination one of the plaintiff's witnesses testified that he with another man, at the request of the defendant's wood-agent, went to see the plaintiff, to ascertain what he would settle his claim for, and reported his terms to said agent. The agent was then called and denied the conversation, and also said that he had no authority to request anyone to see the plaintiff; and, on cross-examination, that he did not assume such authority. The plaintiff was then allowed to show that at said interview the wood-agent gave them to understand that he represented the defendant. *Held*, no error.

ACTION for injuries caused by the defendant's having obstructed a highway. Plea, general issue. Trial by jury, June Term, 1881, Bennington County, TAFT, J., presiding. Verdict for the plaintiff.

The plaintiff's testimony tended to prove that at a certain point in the town of Pownal, about a mile south of the village of South Pownal, said highway passes on a curve around the foot of a hill containing a deposit of gravel, and said railroad passes on a like curve around the foot of the same hill, outside of the highway. That said railroad was laid out and constructed at this point directly upon the highway as theretofore used, and the latter was thereby crowded easterly into the narrow space between said railroad and said hill, and as the same was used by the public from the time of the construction of said railroad down to and at the time the plaintiff received the injury complained of, said highway at said point ran for a distance of about forty rods close beside said railroad and between the railroad fence and the foot of said hill; that in the spring of 1876, the defendant constructed a spur or side-track leading from its railroad across said highway, near the north end of said forty-rod strip, and extending thence south-

erly around the foot of said hill between said highway and said gravel bank, and commenced to load said gravel upon its cars upon said side track and haul the same away; that in the course of so doing, and while defendant was carrying on said work with its own employes, a large amount of debris consisting of stones and masses of concrete too large to be loaded and used, and of stumps and roots of trees standing and growing upon said side hill were moved across said side track and deposited along the side of said travelled highway, thereby crowding said travelled highway closer to said main railroad track than before, and narrowing the space available for the passage of teams therein; and that among the debris so deposited was a large root which caused the overturning of plaintiff's wagon, as hereafter stated.

The plaintiff's testimony further tended to show that at the time he received his injury a large amount of gravel had been removed from said gravel bank, and there were then two side or spur tracks extending into said gravel pit, and that on such side track nearest the highway were standing twenty-eight gravel cars, platform cars, and coal cars, the one nearest the crossing of the highway over said side track being a coal car belonging to the defendant and placed there by the defendant, the end of which was only ten feet from the centre of the travelled path of the highway, and at a point in said highway, where the plaintiff's evidence tended to show that the same had been used as a public highway for more than sixty years, which car was considerably within the limits of said original highway. Plaintiff's evidence further tended to show that on the fifteenth day of April, 1878, he was driving with his horse and wagon along said highway, and as he approached said forty-rod strip of road, knowing that a regular train from the west was about due, and being acquainted with the condition of said highway and its proximity to the railroad, stopped his horse and listened; that he neither saw nor heard any approaching train, and believing that the cars were not coming, started to drive through said forty-rod strip; that as he was passing over it and when he had reached a point some eight or ten rods short of the position of said coal-car, he heard a train coming rapidly from the west which immediately came in sight around the curve very near him, and almost directly in front of his horse; that the horse was frightened and the plaintiff was unable to control him; and that he swerved from the travelled path of said highway to the right, running directly towards said coal car standing across the same, where he wheeled around to the right and ran back along the easterly side of said forty-rod strip and of the travelled track of the highway therein until the wheels of the wagon struck the

said root with such force that the wagon was overturned with great violence, the plaintiff thrown out towards the railroad fence and severely injured and the wagon broken ; that but for the position of said car as aforesaid, his horse would not have turned round, but would have continued along the side of the highway in safety ; and that said root lay within a few feet of the travelled path of said highway and about fifteen rods southerly from said car, a large amount of said other debris being scattered in the same vicinity and along the side of said highway southerly from said root.

Defendant's testimony tended to show that plaintiff's horse and wagon did not get out of the travelled track of the highway at all, but that the horse being frightened by the approaching train suddenly turned round in the travelled track and tipped the wagon over and threw plaintiff out, and that neither the root, debris or cars contributed at all to the injury of the plaintiff.

The court charged as to the defendant's request mentioned in the opinion as follows :

“ A question has been made with reference to the highway,—the existence of it as a legal highway, whether it is such an one that plaintiff would have a right to recover on account of these nuisances or obstructions being placed in it. There is no testimony in the case of the original survey of the road, or where the limits of it are ; and there is no testimony, if I understand it correctly, as to where the lines of the railroad are. . . . I think the fact, that there has been no survey of it and no testimony of it with reference to where the lines of the highway are in that respect, is no bar to the recovery of the plaintiff, provided you find that there was a public highway travelled by the public, used by the public, and that these obstacles were upon the highway that was so used by the public at that time. If you find these facts with reference to it, it is no bar to recovery that there is no recorded survey, or that the plaintiff has not shown to you the exact location of the boundaries or lines.”

The other facts are sufficiently stated in the opinion of the court.

H. A. Harman, J. K. Batchelder and T. Sibley, for defendant.

When a highway is gained, not by survey and paying damages, but by gradual encroachment, does the legal highway extend beyond the limits of actual use ? Is there, beyond this, a space not

wrought for travel but still within the legal highway limits, which the land-owner is bound to keep free from obstruction, as he is not bound to keep the rest of his land?

This mooted question was sharply defined by the defendant's request to charge. The court was asked to rule that such highways have no margins; but this request was refused, and instead, the jury were merely told that if there was a highway and these obstacles were upon it, the plaintiff need not show where the lines of that highway were, thus leaving to the jury to decide that pure question of law which the defendant has brought here for revision. It is error to leave law questions to the jury. *Collamer v. Langdon*, 29 Vt. 32; *Driggs v. Burton*, 33 Vt. 124; 32 Vt. 607.

Robinson's statements inadmissible. Story Agency, ss. 134-5; 1 Greenl. Ev. ss. 118, 449; 2 Ib. 53; *Brigham v. Peters*, 1 Gray, 139.

Prout & Walker, for plaintiff.

The right of action is complete both at common law and by statute. *Abbott v. Mills*, 3 Vt. 521; R. L. ss. 3131, 3132, 3133.

The court cannot exclude "margins" in such a case as matter of law. An obstruction adjacent to a travelled road or path, dangerous in case of sudden casualty, is a nuisance. *Beck v. Carter*, 68 N. Y. 288.

In the present case there was evidence that the result of the depositing the debris, including the root in question, was the "crowding said travelled highway closer to said main railroad track than before, and narrowing the space available for the passage of teams therein." The jury might well find, as the fact was, that plaintiff was overturned upon what had been travelled road for twenty years prior to the working of this gravel pit. The request overlooked this evidence altogether.

Even without this proof, however, the request was wholly incorrect. Wood on Nuisances, ss. 240-290; *State v. Wilkinson*, 2 Vt. 480; *State v. Atkinson*, 24 Vt. 448, 459; *Prouty v. Bell*, 44 Vt. 72; *Bagley v. Ludlow*, 41 Vt. 425; *Coates v. Canaan*, 51 Vt. 131.

The opinion of the court was delivered by

ROYCE, Ch. J. When the accident for which he claims to recover happened to the plaintiff, he was travelling upon a public highway in the town of Pownal. When the defendant constructed its railroad in said town, in 1857, it occupied for its road-bed what had been a public highway for more than sixty years, and it was thereby crowded easterly; and the highway that was thus crowded easterly was the one upon which the plaintiff was travelling at the time of his injury. There was no evidence that said highway had ever been laid out, but it did appear that it had been used as a public highway since 1857. The defendant company became the owner of the land contiguous to this highway in 1876, and while occupying it the plaintiff's evidence tended to show that it placed the obstructions upon and so near to it that it was rendered unsafe, and that such obstructions were the proximate cause of the injury he sustained.

The defendant in the court below requested the court to charge that to entitle the plaintiff to recover he must prove that the obstructions complained of were within the surveyed limits of the highway; that where land has been dedicated for a highway the right of the travelling public to use it for travel is confined to the actual track made by such travelling public, and no margin exists. While that may be true as defining and limiting the right of user, and that as between the adjoining land owners and a traveller no margin exists that the traveller has the right to enter upon or use, it does not follow that such land owners have the right to so use such margins as to endanger the safety of a traveller while he is travelling in the track which the public have the right to travel upon.

The court complied with the request as far as the defendant was entitled to have it complied with, and in its charge upon the subject of the request to which exception was taken, we find no error. The court further charged that to entitle the plaintiff to recover it must be found that the obstructions complained of were upon the highway that was used by the public at that time, and the jury must have so found. It is claimed in argument that there was no evidence to support such a finding; that question should

have been presented in the County Court and before judgment on the verdict. This court cannot assume that there was no such evidence.

In the cross-examination of one of the selectmen of Pownal, who was a witness called by the plaintiff, he testified that he, with another of the selectmen, by request of one Robinson, who was the wood agent of the defendant, went to see the plaintiff and ascertain what he would settle the claim that is in question in this suit for, and obtained his terms and reported them to Robinson. Robinson's agency and connection with the subject-matter in controversy were thus brought into the case by the defendant. Robinson was then called as a witness by the defendant, and denied having any such conversation as the selectman had testified to, and said he had no authority to request anyone to go and see the plaintiff; and, on cross-examination, that he did not assume any such authority. The plaintiff was then allowed, against the objection and exception of the defendant, to show that at said interview Robinson gave them to understand that he represented the defendant. What transpired at that interview was only material as tending to show an acknowledgment of liability, and to be prejudicial to the defendant it should have been shown that Robinson had authority to act for the defendant. No such authority could be presumed from the fact that he was the defendant's wood agent, and no other authority or agency seems to have been shown. The presumption is that the court gave the jury proper directions as to the use to be made of the evidence concerning what had transpired at that interview, as they might have found it to have been, and with such instructions it is not easy to see how the defendant could have been prejudiced if they did not find it as the plaintiff's evidence tended to show.

There was a question of veracity between the plaintiff's witnesses and Robinson. Robinson denied having made any such proposition as the plaintiff's witnesses had testified to, and as confirmatory of his denial, denied having authority to make it, or that he assumed to have authority. It would be more probable that he did make the proposition if he assumed that he had the

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right to make it than it would be if he made no such assumption, and as affecting the veracity of the witnesses who had testified concerning it the testimony was admissible.

The judgment is affirmed.

JAMES QUINN v. JULIUS HALBERT.

Agent. Evidence. Fraud. Change of Possession. Witness Dumb.

1. The property in dispute having been purchased by D. of the assignee of his own insolvent estate, the question being whether the plaintiff or D., the execution debtor, was the owner, and this turning on the question whether D. bought it for himself or as the plaintiff's agent, the assignee and his attorney were witnesses, and what D. at the time of the sale did, or said, or failed to say, as to his agency, was evidence in chief.
2. Also, all the actings and doings of the parties with the property, both before and after it was replevied, and its avails, are admissible as evidence, the goods being in the possession of the former owner, and it being claimed that the sale to the plaintiff was fraudulent as to creditors,—that it was a sale to D. personally, and not as the agent of the plaintiff.
3. After the purchase of the goods the plaintiff furnished D. three hundred dollars, which were used to buy new goods to keep up the stock. In about a month D. paid the plaintiff three hundred and fifty dollars and took this writing: "Received of Wm. Doran three hundred and fifty dollars cash, loaned to purchase goods." The plaintiff claimed that a part of the goods purchased with this money was included in his attachment. *Held*, that the receipt was *prima facie* evidence that the money was loaned.
4. It was material to distinguish between the goods first purchased by D. of the assignee and what was subsequently bought in market to keep up the stock. The testimony of the parties who inventoried the goods after the attachment, who had long experience in the same branch of trade, as to particular marks and figures on the bills, which were in accord with the *general custom* of the trade, by which they identified certain goods of the last lot, was admissible.
5. The plaintiff was a legal witness, though *dumb, uneducated in the use of signs*, and only ab'e to assent or dissent in answer to a direct question by a nod or shake of the head; but the disability detracts from the weight of the testimony, and the jury should have been so instructed.

 Quinn v. Halbert.

REPLEVIN for a quantity of clothing. Trial by jury, April Term, 1881, Franklin County, ROYCE, J., presiding. Verdict for plaintiff. The facts are sufficiently stated in the opinion of the court, and in the 52 Vt. 353, where this case is reported.

Wilson & Hall, H. R. Start and Farrington & Post for the defendant.

The plaintiff being *dumb* is not a witness. 1 Whart. Ev. s. 405; 1 Phil. Ev. p. 10; 2 Ib. 883, n.; 8 Cow. 92; 1 Denio, 19. Twigg should have been permitted to testify as to the object, use, and purpose of the numbers in the first column of the bills and inventory. It was not the custom or usage of a particular house or person but of the trade. Twigg and Doran were both doing business in the same line of goods as merchants, and were subject to the same customs and methods and way of doing business and buying and receiving goods. It tended to demonstrate beyond a doubt that the one hundred and forty-two dollars worth of new goods were purchased on the bill of March 28th, 1878. *King v. Woodbridge*, 34 Vt. 566-574; *Laurent v. Vaughn*, 30 Vt. 90-94; *Brown v. Hitchcock*, 28 Vt. 452-457; 2 Greenl. Ev. ss. 249, 250, 252; 2 Phil. Ev. 788, n.; *Lindsley v. Lovely*, 26 Vt. 123. Farnsworth's testimony admissible. *Richardson v. Royalton & W. Turnpike Co.*, 6 Vt. 496, 503; *Kimball v. Locke*, 31 Vt. 683, 684; *Houghton v. Clough, et al.*, 30 Vt. 312; *Beattie v. Grand Trunk R. R.*, 41 Vt. 275; *Seward v. Garlin*, 33 Vt. 583-592; *Cady v. Owen*, 34 Vt. 598.

H. S. Royce, for plaintiff.

Plaintiff a legal witness. 1 Greenl. Ev. 366-435; *Hopkins v. Steel*, 12 Vt. 582; 21 Vt. 439. It has been decided by this court that the inventory made by Branch and Twigg was not admissible. *Quinn v. Halbert*, 52 Vt. 353.

The opinion of the court was delivered by

REDFIELD, J. This action is replevin for goods attached by defendant, as an officer, as the property of Doran. The plaintiff claims that he owns the goods by purchase of Doran's assignee in

bankruptcy. The defendant claimed that the purchase from the assignee was really the purchase of Doran and not the plaintiff; 2d, that if the plaintiff purchased the goods in form, the transaction was collusive and fraudulent as against the creditors of Doran; and that if plaintiff loaned money on the security of the goods, the lien was invalid for the want of a record; 3d, that a portion of the goods was purchased in market after the purchase of Doran's assignee, and, as the defendant claims, with Doran's money.

I. The assignee Farnsworth was offered as a witness to prove that he sold the goods to Doran, and in the negotiation and purchase the plaintiff's name was not mentioned, and no intimation made by Doran that he was not purchasing for himself. This testimony was excluded, for the alleged reason that no foundation had been laid for the testimony by an enquiry of Doran. If the testimony was admissible only to impeach the witness Doran, there was no error in its exclusion. But Doran bought and sold the goods, and, as he now claims, as agent for the plaintiff, and the issue was whether his acts and doings were those of an agent or owner of the goods; and this evidence bore directly on the issue, and was evidence in chief; and so far as it contradicted the testimony of Doran, it could properly be used by way of impeachment. The exclusion of this evidence was, therefore, error.

II. The defendant proposed to enquire of Doran, on cross-examination, in regard to the sale of the balance of the goods replevied in the winter of 1880, the amount of the sales, and the manner of conducting the business, and said testimony was excluded. The defendant, as an attaching officer, represented the creditors, and the property attached by defendant had been formerly owned by the debtor, and was found in his possession, being disposed of by him; the plaintiff claims to be owner of the property by purchase, though never in his possession. The defendant claims that the debtor is the real owner, and that the plaintiff's purchase is collusive, and fraudulent as against the rights of the creditors.

The manner of conducting the business, and the method of disposing of property thus situated, whether it be consonant with an agent selling property for a principal, to whom he should account, or that of an owner selling goods for himself, all the actings and doings of the parties with the property and its avails are admissible as evidence to be weighed by the jury in determining the character and quality of the title in dispute. The exclusion of this evidence was, therefore, error.

III. After the purchase of this stock of goods, the plaintiff furnished to Doran \$300, which was used to purchase new goods to keep up the stock; and defendant's evidence tended to show that \$142.75 in value of goods purchased with said money was on hand, and included in the defendant's attachment; and that said \$300 was not furnished by plaintiff to buy goods for himself, but was a loan to Doran. This money was furnished on the 26th of March, 1878, which was used in the purchase of goods on the 28th of the same month. On the 23d of April of the same year, Doran paid the plaintiff \$350, for which plaintiff gave his receipt, stating: "Received of Wm. Doran \$350, cash *loaned* to purchase goods." The defendant requested the court to charge the jury that the receipt, signed by the plaintiff, was *prima facie* evidence that the sum named therein was a loan by plaintiff to Doran, and subsisted as a debt until paid. We think the construction of the receipt called for in this request is sound law, and should have been complied with; and the omission to do so was error.

IV. The defendant requested the court to charge that the evidence of Hall and Farnsworth tended to show a conditional sale of the goods, and that the receipt tended to show that the money advanced to buy the goods was a loan, and that the plaintiff did not own the goods, but had a lien on them as security for the money loaned. We think these requests should have been complied with. As between the parties to the transaction, the plaintiff had a right to the custody of the goods, whether he owned the property or had a lien on it as security for a debt; but as against

this defendant, who stood on the right of an attaching creditor, a verbal lien on the goods was unavailing.

The omission to charge on this subject, which was a substantial matter on the defence, or comply with the special requests, we think was error.

V. The testimony of Twiggs and Branch we think was admissible. They had long experience in this branch of trade, and by particular marks and figures on the bills, which were in accord with the *general custom* of the trade, they identified certain goods that were attached as belonging to the lot purchased in market after the first purchase from Farnsworth.

VI. The plaintiff was allowed to testify against the objection of the defendant. By some infirmity of the vocal organs he was bereft of the power of speech. He could not explain any proposition, but only assent or dissent in answer to a direct question by a nod or shake of the head. And when asked who owned the goods, he would touch his person to indicate that he was the owner. The defendant claims that as he was deprived of the substantial benefit of a cross-examination of plaintiff, he ought not to be admitted as a witness; and if allowed to testify, his inability to explain the transaction and its incidents in cross-examination should be weighed by the jury as affecting the *credit* of the witness. The court declines so to instruct the jury. The witness was *dumb*, and at common law would not be probably admitted to testify. Modern education has done much to give this unfortunate class of persons the capacity to convey ideas, in many cases with marvelous facility and exactness, by signs and symbols; and such persons are now proper and legal witnesses. The plaintiff was uneducated in the use of signs, and his capacity to convey his ideas to others was very circumscribed and limited. But the tendency of modern times is to permit all persons that have knowledge of matters in litigation and capacity to throw light upon them, whether interested or otherwise, "Jews, Turks and infidels," and allow the jury to consider their relation to the case, and condition as affecting their credit. We think the plaintiff was a legal

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witness ; but the court should have complied with defendant's request, and called the attention of the jury to the plaintiff's peculiar disability as affecting the weight of his testimony.

The judgment of the County Court is reversed, and cause is remanded.

CLARK C. KIMBALL v. O. C. WOODRUFF.

Exempt Forage.

The exemption of forage is an independent claim or right not conditioned upon the debtor's having the exempt animals to consume such forage; hence, when the plaintiff owned only an exempt cow and horse, and the defendant, a sheriff, barely left him hay enough to keep them through the winter, and sold a quantity of hay needed to keep all the stock exempted by statute, such sheriff is liable in trespass.

TRESPASS and trover for a quantity of hay. Trial by court, December Term, 1881, Caledonia County, Ross, J., presiding. Judgment for plaintiff. The parties agreed on the following facts :

That the property for the taking and converting of which this suit is brought was regularly and legally taken and sold on a valid execution by the defendant as sheriff, provided the property sold was not exempt from attachment and levy ; that at the time of the said levy and sale, the plaintiff had two cows and one horse ; and that one cow and the horse were exempt from attachment, and that he had no other horses, cattle and sheep, and did not have any others during said winter ; that hay enough was left to the plaintiff at the time of said levy and sale to keep the said exempt cow and horse through the remainder of the winter ; but the hay sold by the defendant would have been needed to keep all the stock exempted by statute. The plaintiff's declaration alleged that the hay was taken February 17, 1880.

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Belden & Ide, for the defendant, cited 24 Wis. 569; 10 Mich. 538; Thompson Homes, 814.

J. P. Otis, for plaintiff, cited 14 Barb. 459; 11 Wend. 44; 7 Vt. 470; 41 Vt. 702; 45 Vt. 40; 40 Vt. 644.

The opinion of the court was delivered by

POWERS, J. The question presented in this case is whether the exemption from attachment of forage in our statute of exemptions is conditional upon the debtor's having the exempt animals specified to consume such forage; and it is to be determined wholly upon a construction of the statute itself.

Exemption laws exist in all our sister States in some respects similar in phraseology to ours, and in other respects quite different. The decisions of other States are based upon the language of their own statutes, and can therefore afford us little aid, as they would did the question involve a common-law principle.

This court has ever construed these statutes liberally in favor of the debtor, as such was the spirit which prompted their enactment.

Our statute exempts one cow, ten sheep, a yoke of oxen or steers, or, in lieu of the oxen or steers, two horses kept and used for team work. The exact phraseology of the statute is "and also one yoke of oxen or steers, as the debtor may select, two horses kept and used for team work, and such as the debtor may select in lieu of oxen or steers, but not exceeding in value the sum of two hundred dollars, with sufficient forage for the keeping of the same through the winter." "Provided that the exemption of said horses and forage therefor" is not to extend to contracts made before a date named.

At the time of the attachment of the hay in question, the debtor had two cows and one horse, and had no other exempt animals. Can he claim as exempt forage sufficient to keep exempt animals through the winter, unless he owns such animals to be so kept? We think he can.

In the former part of the same section quoted above, one cow and ten sheep are declared to be exempt; later on is found this

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clause, "forage sufficient for keeping not exceeding ten sheep and one cow through one winter." It has always been understood that this exemption of forage was absolute, irrespective of the fact whether the debtor had the ten sheep and cow or not.

The clause exempting the oxen or horses reads "two horses, . . . *with* sufficient forage for the keeping of the same," &c. The preposition "*with*," as here used, is to be construed as connecting two independent subjects rather than as joining a dependent or qualifying clause to one subject. It is the same as if it read, "a yoke of oxen, and, *in addition thereto*, forage," &c.

This construction is in accord with the settled understanding of our people, and we think it expresses the intent of the legislature.

Judgment affirmed.

EVERETT D. MORSE v. JAMES F. BISHOP.

Award Final.

1. An award, though erroneous, if fairly made, is as conclusive upon the parties as a judgment; hence B. having so'd lumber to M., and C. claiming to be its owner, having brought an action of trover against M. and recovered, and afterwards, but before the judgment was paid except by note, B. and M. having "arbitrated all matters of differences between them," and the arbitrators only al'owing M. what he had paid for the lumber, and not his costs in defence of its title, it was *held*, that the award was conclusive, and that M. could not sustain an action against B. to recover such c.st.
2. When the reference is general the case is to be tried on the facts, without reference to the form of pleadings; hence, the defendant, without written plea, may rely on an award in defence before a referee.

ASSUMPSIT. Heard on the report of a referee, December Term, 1881, Caledonia County, Ross, J., presiding. Judgment for the defendant. No pleadings in writing had been filed in the case; but the defendant's attorney announced to the referee that he should try

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the case on the plea of non-assumpsit, and a former adjudication. The defendant duly excepted to receiving any evidence in regard to the latter, as it had not been pleaded in writing; but the referee received it. It appeared that the defendant sold to the plaintiff a quantity of lumber; that Mr. Cahoon, claiming to be its owner, brought an action of trover against plaintiff and recovered a judgment at the December Term, 1876, Caledonia County court, amounting to the sum of \$182.02, September, 1877; that the plaintiff had never paid this judgment except by giving his note therefor, dated February 21, 1880; that he paid to witnesses in that suit \$18.20; to attorneys for services \$83.00; and that he charged for his own trouble \$25.00.

The referee found:

" At the time Cahoon took the plaintiff's note in settlement of his execution against him, he also took from the plaintiff an assignment of his claim against the defendant, so that this suit is prosecuted for the benefit of said Cahoon to the extent of Cahoon's claim or the amount of the plaintiff's note to him. The plaintiff was allowed, against the defendant's exception, to give evidence tending to show that at the time he purchased the cedar timber from the defendant the defendant agreed to indemnify him against all loss that should arise by reason of Cahoon's claiming the same. The defendant excepted to this evidence on the ground that by the lien note, the contract as to the sale of the timber had been so reduced to writing that parol evidence was not admissible to add thereto or to vary the contract as expressed by the note. The referee received such testimony against such exception. If such testimony was properly received, then I find that the defendant, at the time of the sale of the cedar timber, and as a part of the contract, did agree to indemnify the plaintiff against any claim that others might make successfully to the timber. . . . September 22, 1877, the plaintiff and defendant agreed to and did arbitrate all matters of difference between them before Jesse Marshall, Marshall W. Stoddard and George W. Woodruff. A full hearing of their matters of difference was had, George W. Cahoon, Esq., appearing for the plaintiff, and H. C. Belden, Esq., for the defendant. The result was an award in favor of the defendant for \$21.72, as appears by the award which accompanies this report. The plaintiff introduced before the arbitrators, as specifications of his claims, exhibits marked Nos. 3, 4 and 5, and the Cahoon execution. The Cahoon execution

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had not then been paid. The defendant introduced before the arbitrators, as specifications of his claims, exhibits marked Nos. 1, 2 and 6. Testimony was introduced as to what the contract was by which the defendant sold the cedar timber to the plaintiff, the plaintiff's testimony tending to show that by the terms of the sale the defendant agreed to indemnify the plaintiff against other claims to the timber, and the defendant's tending to show that no such indemnity was made or agreed upon. The defendant's counsel then claimed that the indemnity was not proved, and that the defendant, unless a special indemnity was proved, would not be liable for any of the costs and expenses of the Cahoon suit against the plaintiff, but that as the defendant's title to the cedar timber had failed, the defendant could not recover on his lien note, and that the plaintiff would be entitled to recover back what he had actually paid the defendant towards the same; and that in any event the plaintiff could not recover for the amount of the Cahoon execution, because he had not paid the same. That hearing resulted, as nearly as can now be ascertained, so far as regards the claims here at issue are concerned, in the arbitrators' allowing the plaintiff twenty-five dollars for the old horse he had delivered the defendant in part payment towards the cedar timber, and in their rejecting the lien note presented by the defendant and the claims made by the plaintiff for what he paid witnesses in the Cahoon suit and for Cahoon's claim on his execution against the plaintiff. They also rejected the defendant's claim for witness fees in the Cahoon suit, and also the plaintiff's claim for damages for being arrested in the Cahoon suit. The arbitrators could not recall definitely what their reasons were for their action, but in general said that they threw out these claims as not established, and that they considered the Cahoon suit as between Cahoon and the plaintiff and not as a matter properly between the plaintiff and defendant. The plaintiff paid the award to the defendant. On these facts it is apparent that the plaintiff has received back all that he has ever paid the defendant towards the cedar timber.

Cahoon & Hoffman, for the plaintiff.

Evidence to support the oral plea of a "former adjudication" was improperly received. *Fulton v. Wiley*, 32 Vt. 763; *Cook v. Carpenter*, 34 Vt. 126; *Sumner v. Brown*, 34 Vt. 197. It was proper to call the arbitrators to testify in this case as to what matters were adjudicated at the arbitration. The eighty dollars in plaintiff's present account had not then been paid. *Post v. Smi-*

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lie, 48 Vt. 191 ; 17 Vt. 419 ; Freeman Judg. 297. It was competent to show what the award was made up of. 47 Vt. 9 ; *Ib.* 524 ; 35 Vt. 231. The award will only bar what is adjudged. *Briggs v. Brewster*, 23 Vt. 100 ; *Robinson v. Morse*, 29 Vt. 408, 463 ; *Buck v. Buck*, 2 Vt. 417.

Belden & Ide, for the defendant.

On a general reference the merits of the case are to be tried. *Carter v. Howard*, 39 Vt. 108. The award was absolutely final. *Young v. Kinney*, 48 Vt. 22 ; *Soper v. Frank*, 47 Vt. 368 ; *Lamphire v. Cowan*, 39 Vt. 426 ; *Rixford v. Nye*, 20 Vt. 132 ; 27 Vt. 130-7 ; *Morse Arb. v. Award*, 487.. The plaintiff could not divide his claims ; he is estopped by the award. 18 Vt. 252 ; 46 Vt. 135 ; 125 Mass. 331 ; 119 Mass. 473.

The opinion of the court was delivered by

REDFIELD, J. This action is assumpsit, was tried by the referee, and stands on the report.

It has been held by the court that on a general reference the case is to be tried upon the facts, without reference to the form of the pleadings. *Carter v. Howard*, 39 Vt. 108. An award had been made between these parties, and we think the award concludes the controversy. The parties "agreed to submit all matters of difference between them"; the matters here in controversy were submitted, and a hearing thereon had before the arbitrators, and an award made in the premises. Mr. Cahoon, the present owner of this suit and controversy, was before the arbitrators, the plaintiff's attorney, and contended that defendant was liable and bound to indemnify the plaintiff against Cahoon's judgment for the value of the lumber sold by defendant to the plaintiff. The arbitrators awarded that plaintiff should recover back all he had paid defendant for the lumber ; found no such guaranty or indemnity had been given as claimed, and "threw out these claims" as not established.

These domestic tribunals are in the interest of peace, and the State has an interest that controversy should end. Such courts sometimes get aside of technical law, but ordinarily reach sub-

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stantial justice. If the defendant sold the lumber to the plaintiff for legal consideration, the sale ordinarily carries with it a guarantee of *title* to the property sold ; but an award, though erroneous, if fairly made, is as conclusive upon the parties as other *judgments*.

It is said that at the time of the arbitration plaintiff had not paid Cahoon his judgment for the value of the lumber, and therefore had no claim to recover it of the defendant. But the arbitrators had full power to award that defendant should indemnify and pay sums as plaintiff should have to pay on Cahoon's judgment against him. An arbitrator is not hampered with specifications and pleading, but determines rights and duties between the parties as well as sums to be paid. Judgment affirmed.

LAMOILLE VALLEY R. R. COMPANY, AND ESSEX COUNTY
R. R. COMPANY v. FREEMAN BIXBY AND MONT-
PELIER & ST. JOHNSBURY R. R. COMPANY.

[IN CHANCERY.]

*Railroad. Partnership. Creditors. Cross-Bill. Levy on
Engine.*

The defendant railroad and the orators under a partnership arrangement were operating the three lines of road. Defendant B. obtained a judgment against the defendant railroad for injuries received through its neglect, not knowing of the partnership. He levied his execution on an engine, tender and baggage car, owned by the three companies, and the same were sold to his agent, L. ; and he had also levied upon another engine owned by the same companies, and had advertised it for sale, when he was enjoined. A bill having been brought, setting up the superior rights of partnership creditors, *Held*,

1. Although the rights of partnership creditors, as a rule in equity, are superior to those of the individual creditors, yet the court will not enjoin, where equities are equal ; or, where, as in this case, it does not clearly appear by allegation or proof, that the partnership indebtedness *existed at the time the property was seized on execution* ; or, especially, under the special provisions of our stat-

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ute. R. L. s. 3443, whereby a passenger, injured through the negligence of a railroad company, has a right in attaching cars, engines, &c., superior to the general equity of the partners.

2. *Bill in the nature of a cross-bill.* It is decreed that the orator in the cross-bill, defendant B., obtained a va'id lien on *one third* of the engine levied on ;
3. But no decree could be made as to the property sold to L., unless he were made a party ; and the validity of that sale would seem wholly a matter of law.
4. The priority of right or partnership creditors exists only in equity, not in law.
5. R. L. s. 3443, property held for injuries on railroad, construed.

BILL in Chancery. Heard on bill, answer and testimony, December Term, 1877, Ross, Chancellor, Caledonia County. Decree *pro forma* for the orators. The bill alleged as to the partnership indebtedness :

“ Your orators further show that prior to the building of either of said roads, to wit : on the day of a joint or partnership arrangement was entered into by the said three corporations to build and equip and run their several roads under one management, and to raise money for that purpose upon their joint credit, and by joint mortgages of their several roads and property, and each of said companies was to pay its proportion of the monies so raised, as should be expended upon its road, and said several roads were built, and have been run under said arrangement, and the same is still in full force between the said companies.

And your orators show, that of the monies so raised upon the joint credit of said companies, and by mortgage of the several roads of each of said companies, a much larger proportion was expended upon the Montpelier and St. Johnsbury Company's road, than either of the others, so that upon a fair adjustment of the accounts between the companies, the said Montpelier and St. Johnsbury Companies, for the monies so raised and expended there would be due to the orator companies from the said Montpelier and St. Johnsbury a large sum of money, as your orators believe of more than fifty thousand dollars.

And your orators further show, that in the purchase of equipments, furniture, and supplies for the use and operation of said roads under said joint or partnership management, and for expenses of operating the same, a large amount of joint or partnership debts have been created, and are now outstanding, largely exceeding in amount the value of all the personal estate and property of every kind held by said companies, and the several roads of the said three companies are so heavily encumbered by mortgages as not to be available for that purpose provided they were liable therefor. And your orators insist that both in law and

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equity all the joint personal property and assets of the said road acquired under their joint or partnership arrangement are liable and held for the payment of said joint or partnership debts before it can be reached or applied to the payment of a liability of either of said companies alone, and that not only the joint or partnership creditors have a right to have the joint property so applied, but that each party to such joint or partnership arrangement has an equitable right to have such application made and to object to and resist the division of any of such joint or partnership property to the payment of the several debts of either of said companies."

"And your orators further allege that all the rolling stock, equipment, furniture, and personal property of all kinds upon the said roads, does not exceed in value sixty thousand dollars, and that the said three companies jointly owe debts incurred for service rendered, and material furnished for the purpose of keeping the same in repair and running the same, to an amount very largely exceeding the value of all the rolling stock, furniture, equipment, and personal property on said roads, and they believe to the amount of three hundred thousand dollars, and that they have no other property, or means of paying the same, and that each of said creditors has at least as much a lien, and as much equitable claim to payment of his debt out of such property, as said defendant, and that if defendant has any right whatever, it is only for his *pro rata* share therein upon a proper marshaling of all such assets."

The defendant Bixby had sold in part satisfaction of his execution the engine "Swanton," tender and passenger car attached, to J. P. Lamson. The prayer of the cross-bill was:

"And your orator prays that the title to the said engine and tender called the 'Swanton' and passenger car attached, may be settled and the title confirmed to your orator, that your orator's judgment against the Montpelier and St. Johnsbury railroad company may be decreed a first lien upon the rolling stock owned by the said three corporations, and that said lien be enforced by a sale of said rolling stock or so much thereof as may be necessary for the payment of said judgment, and in case this Honorable Court shall decide that your orator was only entitled to have one undivided third part of said rolling stock sold on said execution, then your orator prays that in default of the payment of said judgment, that said third part may be designated and set apart and sold, or enough thereof sold to satisfy said judgment," and for further relief.

S. C. Shurtleff and *J. P. Lamson*, for the defendants.

The other partners cannot maintain this bill, as they are insolvent, as shown by the proof, and there is no assurance that they would apply it to pay the other partnership debts. The bill does not allege, and the proof does not show, that at the time of the attachment of the engine and car in controversy that the concern was insolvent. The bill must fail for this cause. *Willis, Admr. v. Freeman*, 85 Vt. 44; *Russ, Admr. v. Fay*, 29 Vt. 381.

The defendant, Bixby, had the right at law to attach this property. *Reed & Root v. Shepardson*, 2 Vt. 120; *Bardwell v. Perry*, 19 Vt. 292. But on the merits the orators must fail. The bill does not allege, nor does the evidence show, but that every dollar of the joint or partnership indebtedness now outstanding has been contracted since the attachment of this property by the defendant, Bixby. It is for the orators to show it was outstanding at that time, and not for the defendant to show it was not.

The statute, c. 28, s. 65, (Gen. St.) gave the defendant power to attach.

Poland, for the orators.

The property levied upon by the defendant, Bixby, was partnership property, bought and paid for by partnership funds. It is conceded that the partnership debts exceeded the value of all the property or assets.

In such case the law is perfectly settled that a creditor of one member of the firm cannot levy upon any specific portion of the partnership property and apply it to the payment of his debt. If he would reach the parties' interest in the partnership for the satisfaction of his private debt, he must take his interest in the whole after the partnership debts are all paid. The partnership property must first be applied to pay the partnership debts, and there is no interest that an individual partner or his creditor can take till this has been done. *Parsons Partnership*, c. 10; *Washburn v. Bellows Falls Bank*, 19 Vt. 278.

The defendant seeks to avoid the effect of these plain and obvious principles in several ways. He says his claim was one for which the partnership was liable, and he might have sued and

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obtained judgment against all. If this were so, it does not seem clear how it can help the defendant.

Can the property of A. be taken and sold on an execution against B., because A. was holden for the same debt, and might have been sued jointly with B. ?

But the cross-bill is founded on an entirely new and different claim from the original bill, and there is no connection between the two; and it is clearly no case for a cross-bill, which is only one mode of defence. *Slason v. Wright*, 14 Vt. 208; *Rutland v. Page*, 24 Vt. 481.

The opinion of the court was delivered by

REDFIELD, J. This bill is founded upon the claim of the superior rights of the creditors of a partnership in its property to the individual creditors of one member of the firm.

The bill alleges that the line of railroads now known as the "St. Johnsbury and Lake Champlain Railroad," consisted of three corporations, viz., the two made orators in this bill, and the Montpelier and St. Johnsbury Railroad Company; that while operated by the three roads jointly under a written contract, the defendant Bixby recovered judgment for a personal injury against the latter railroad company while a passenger on the line of its road, occasioned by want of care in operating said railroad; and has levied an execution founded on such judgment upon a locomotive, tender and baggage car which was the property of the three railroad companies. Bixby was enjoined and restrained from selling the property by the chancellor.

The defendant Bixby answers, and brings a cross-bill denying the equity of the orators, and claiming a superior right under his levy. Further details in the pleadings or proof do not seem important in the determination of the case.

I. It is settled law that the partnership creditors have in equity a superior right to the property of the firm, to insure the payment of its debts over the attaching creditor of one member of the partnership. And this is based upon the supposed lien which the partners have among themselves upon the assets of the

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firm. But the embarrassment in this case arises upon the application of these principles to the case in hand.

The principle invoked obtains only in equity, and at law the defendant Bixby might attach and sell one *third* the property in question, without regard to the equities of others. *Bardwell v. Perry*, 19 Vt. 292; *Reed v. Shepardson*, 2 Vt. 120.

II. It does not clearly appear by allegation or proof that the partnership indebtedness existed at the time the property was seized on execution; if not, the bill is without foundation. *Bardwell v. Perry*, *supra*. In *Brewster v. Hammet*, 4 Conn. 540, where it was shown that the partnership had become insolvent, and its property by foreclosure or otherwise had gone out of its hands, the court refused such application on the ground that it felt no assurance that the partnership creditor would be benefited. These corporations have undergone many changes and transformations. The joint mortgages upon their railways and property have been foreclosed, and titles to the same have passed to others under decrees of the court; and now the whole line of these railroads is operated under a different name; and how far the claims of creditors have been satisfied by their decrees of court, is not known. In this condition of the property there would seem no equitable ground for interfering with the legal rights of Bixby under his levy. Yet we should hesitate to dispose of this case upon these grounds without a more careful examination of the evidence and authority.

But the statute of 1855, which is section 3443 of the R. L. of this State, declares that "when the property or person of another is injured through the default of a railroad corporation, its agents or employes, the cars, engines, and other property, which at the time of such injury are subject to use in the running and management of such road, and which at any time have been owned by said corporation, shall be held to be the property of such corporation for the purpose of furnishing indemnity for such injury; and may be attached and levied upon as such at the suit of the party injured." The defendant Bixby obtained judgment against the Montpelier and St. Johnsbury Railroad Company for a per-

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sonal injury suffered while a passenger on said road, through the alleged default of said corporation. The alleged default of the corporation and the damages occasioned by the injury to Bixby, are conclusively established by the judgment. It is now proved that all the engines and cars were owned and the trains run by the three corporations, under a written contract between them, but this was unknown to Bixby until after he obtained his judgment. He found the franchise granted to this corporation being used in a train of cars on a track in the line of its road. He had a right to presume that all this was done by it in the exercise of its lawful franchise. And every participator in the act of running the train of cars is presumed to have knowledge of the law. It is not important, as we think, whether each corporation runs the train over its own section of the line, or, whether by mutual contract they jointly run the whole line; the property attached to the extent of defendant corporations' ownership, is by the statute made subject to attachment to respond and "indemnify" the passenger for the injury suffered. And such passenger has, by this statute, a special right in his attachment of the engine and car superior to the general equity of the partners in the partnership property. If the equities were equal, the defendant having attached the property should be permitted to pursue it. *Bardwell v. Perry, supra*; *Ex-parte Ruffin*, 6 Ves.

As to the cross-bill. The sale of the engine "Swanton," tender and passenger car attached, which were bid in and purchased by Lamson, is a matter entirely foreign to the subject-matter of the original bill. Lamson, though he acted in the purchase as agent for Bixby, was vested with the legal title and no decree could be made affecting *that* property unless he were made party; besides, the validity of that sale would seem wholly a matter of law. The introduction into a cross-bill of a distinct and independent subject of controversy, and not within the scope of the original bill, is incongruous and not allowable. This is not strictly a cross-bill, but a bill in the nature of a cross-bill introducing additional parties; and the defendant Bixby seeks not only to defend against the orator's bill but to obtain affirmative relief.

The defendant levied his execution upon the property; the

orator by his bill seeks to release the property from the defendant's lien created by the levy, and has enjoined proceedings to perfect and enforce it. By the mutations of title incident to foreclosure, receivership and decrees of court, intervening claims to the property levied upon are now supposed to subsist; and we think the rights and interests of the parties, as we find them, so far as practicable, should be made effectual.

It is therefore ordered and decreed that the orator in the cross-bill, Bixby, obtained by his levy of the execution, in his favor against the Montpelier and St. Johnsbury Railroad Company, a valid lien upon *one third* of the engine called Hyde Park, tender and baggage car attached thereto; and such lien is declared to continue and subsist. The decree of the court below is reversed and cause remanded, with directions to enter a decree for the orator in the cross-bill, Bixby, for the amount of the execution levied upon such property with interest; and if the parties do not agree, the matter will be committed to a master to report the value of such property levied upon at the time of the injunction in this cause, viz.: the 16th of October, 1877; and the amount of *one third* of such valuation with interest therein from the latter date to the present time, which sum to be paid to the clerk of Caledonia county court for the benefit of said Bixby within sixty days from the final decree in this cause, and in default, execution shall issue on this decree, and the property so levied upon sold by the sheriff of said county to satisfy said one third valuation of said property with interest and the costs of sale. And the orators in the cross-bill are to recover their costs.

Decree reversed and cause remanded with a mandate.

J. C. BACON v. D. M. BACON AND CHARLES COBB, EXECUTOR
OF JOHN BACON, 2D.

[IN CHANCERY.]

*Will Revoked. Codicil. The word "Legacy" may apply to
Real Estate. Trust. Pleading.*

The testator willed both realty and personalty to each of his two sons. Afterwards, being dissatisfied with the conduct of one of them, he used the following words in a codicil to the will: "I do hereby revoke the said legacies by my said will given to my said son, Jerome C. Bacon, and I do give to my son, Delos M. Bacon, all of said legacies *in trust*, as follows: that the same be kept by the said Delos M. until in the judgment of the said Delos M. the said Jerome C. shall prove himself worthy of receiving the same, and then and not till then to deliver the same to the said Jerome C. Bacon. It is further my will that if my said son Delos M., shall not at any time judge it best to deliver said property to my said son, Jerome C., that the same shall be and remain the property of my said son, Delos M., and his heirs forever." A bill having been brought by the beneficiary to compel a surrender of the trust estate, *held*,

1. It is an *express trust* for the benefit of the orator, on condition that he proves himself worthy to have it executed in his favor, of which worthiness the trustee is made the judge.
2. But he is not the sole arbiter. His motives may be inquired into. The trustee cannot exercise his discretion and judgment from fraudulent, selfish, or other improper motives; nor can he refuse to exercise them from such motives; but he must act *bona fide*, with a simple view to carry out the intention of the testator; and the court will control his judgment and discretion to the extent of compelling an honest exercise thereof.
3. The word "*legacy*" may be applied to real estate; and, the testator having revoked "the said legacies," revoked the entire will by which realty was bequeathed to the orator.
4. The bill is bad on demurrer; because, there is no allegation that the debts of the estate had been paid; or, that the trust estate was in the possession of the trustee, and it appearing that the testator's estate was unsettled in the Probate Court.

BILL in chancery. Heard on demurrer, June Term, 1882, Cal-
edonia County. Ross, Chancellor, dismissed the bill. The bill,
among other things, alleged:

"The orator further says that between the making of said will and said codicil he (the orator) had been guilty of conduct which had not been pleasing to his father (the testator); and that in

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making said codicil the testator did not intend to cut off said legacies given in the will to the orator, but merely to have the same held in trust till the conduct of the orator was worthy. The orator says that before his father's death and ever since he has conducted himself as became a dutiful son and respectable citizen, and has in every way endeavored to atone for the conduct aforesaid which had so displeased his father (the testator), and that since his father's death he has endeavored to conduct himself so as to merit the approval of the said Delos M., the trustee. And the orator says he believes that he has merited, by his conduct, the approbation of respectable citizens and neighbors ever since his father's death, and that under and by virtue of the provisions of said will and codicil of said testator he has become entitled to have his share of said estate delivered up to him, the orator, by said Delos M. Bacon, trustee; that in any event he is entitled to his share of said land thus given him in the original will; but the said Delos M. has taken the rents and profits of said land and claims that said land belongs to said estate and that none of it belongs to the orator. Your orator further says that he has repeatedly applied to said Delos M. and has asked him to deliver to him, the orator, his share of said estate; and has asked the said Delos in what respect he had proved himself unworthy to receive the delivery of said legacies; but the said Delos declines to state in what respect the orator has proved himself unworthy; nor does the said Delos state or claim that the orator has in any respect proved himself unworthy of receiving said legacies, but declares that he, the said Delos M., is the sole judge of that matter and that if the orator gets any part of the same it will be by legal proceedings."

Part of the will :

"I give, devise and dispose of all my estate, real and personal, save what may be necessary for the payment of my just debts and funeral charges, in the following manner: . . . I also give to my said wife one half the remainder of my estate, real and personal, to be and remain her property during her natural life. And it is further my will that all of said property at the decease of my said wife, shall be and remain the property of my two sons, Jerome C. Bacon and Delos M. Bacon, and their heirs, and if either of my said sons shall leave no issue, then it is my will that the wife of said son shall receive the proportion belonging to said son, meaning hereby that such wife shall hold the same during her life and at her decease the same shall revert to the issue of such son as shall leave issue. . . . I also give said Jerome

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my violin, and my half of the land we own in company. . . .
I give the remainder of my estate to my said sons, Jerome C. and
Delos M., to be by them divided equally."

The other facts are stated in the opinion.

Bates & May, for the orator.

The will and codicil are to be interpreted as one instrument.
1 Redf. Wills, 288. Words in the will are to have the same construction throughout the instrument. *Elliot v. Carter*, 12 Pick. 436.

The codicil revoked the *legacies*, but not the devises. *Malcom v. Same*, 3 Cush. 472; *Hall v. Chaffee*, 14 N. H. 218; *Cooper v. Pogue*, 92 Penn. St. 254; s. c. 37 Am. Rep. 681; *Osgood v. Lovering*, 33 Me. 464; *Putnam v. Society*, 37 Vt. 271; *Decrow v. Moody*, 73 Me. 100. This codicil created an express and positive trust, and under it Delos is bound to keep the legacies a reasonable time—if not during the orator's life—until Jerome can prove himself worthy; and he is bound also to exercise a fair, honest judgment as to the orator's conduct, and to deliver the legacies when the orator is worthy. *Bohn v. Barrett*, 11 Rep. 839; *Hamilton v. Downs*, 33 Conn. 211; *McKenzie's Appeal*, 41 Conn. 607; s. c. 19 Am. Rep. 525; *Dunning v. VanDeusen*, 47 Ind. 423; *Williams v. Worthington*, 47 Md. 572; s. c. 33 Am. Rep. 286; 1 Perry Trusts, c. 4; 31 Am. Rep. 612; 68 Me. 34; 4 Gray, 236. A court of equity in such a case as this will interfere to compel an honest execution of the trust. The authorities are abundant that the court of equity will interfere with the discretion reposed in the trustee by the testator in case that discretion is unfair, dishonest or corrupt. *Woods v. Woods*, 1 My. & C. 401; *Constabodie v. Constabodie*, 6 Hare, 410; 2 Lead. Cas. Eq. 1856; Perry Trusts, ss. 511-519, 520; *Eaton v. Smith*, 2 Beav. 236; *Brown v. Higgs*, 4 Ves. 708; *Marker v. Marker*, 9 Hare, 1; *Clark v. Parker*, 19 Ves. 1; 1 Perry Trusts, s. 117, n. 1; 2 Ib. s. 509, *et seq.*; 2 Redf. Wills, 415, 420, 429.

Belden & Ide and *Cahoon & Hoffman*, for defendants.

The will and codicil make Delos M. Bacon the *sole judge* of the time he considers Jerome C. Bacon worthy of receiving the

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legacy. 1 Lead. Cas. Eq. pp. 15, 16; *West v. Holmesdale*, 4 L. R. H. L. 548; *Magrath v. Morehead*, 12 L. R. Eq. 491; *Hays v. Davenport*, 25 Vt. 109; *Haddelsey v. Adams*, 22 Beav. 276. The testator did not intend to create any special or express trust that could be enforced at the hands of the *cestui que trust* through the aid of a court or by any other instrumentality, but to place the property in the defendant's hands, to give some of it to the orator, if the defendant thought best; but to appropriate it all to his own use if he thought best, making him, by the terms of the will, the sole tribunal to determine the propriety of bestowing any part of the property upon the orator. Story Eq. s. 1070; *Van Amee v. Jackson*, 35 Vt. 177; *Lyman v. Parsons*, 26 Conn. 517. The will, thus construed according to the intent of the testator, bestows upon the defendant a power in distinction from a trust. 1 Perry Trusts, p. 321, s. 3. Trusts are always imperative, and are obligatory upon the conscience of the party entrusted. The court supplies the defective execution of powers; but never the non execution of them, for they are meant to be optional. *Ferre v. Am. Board*, 53 Vt. 170; *Greenough v. Welles*, 10 Cush. 576; *Gibbs v. Marsh*, 2 Met. 251. The title of the defendant being that of a donee of a power, no court has authority to compel him to exercise it in favor of the orator. Story Eq. s. 169; Perry Trusts, ss. 254, 511; *Gibbs v. Shepard*, 125 Mass. 543; *Bull v. Veasey*, 1 Ves. Jr. 271; *Leavitt v. Bierne*, 21 Conn. 1; *Roy v. Master*, 6 Sim. 568; 1 Jarman Wills (5th ed.), pp. 388, 403. The demurrer should stand, because the estate was unsettled. *Adams v. Adams*, 22 Vt. 50; *Boyden v. Ward*, 38 Vt. 628; Rob. Dig. p. 131, ss. 47, 49; *Probate Court v. Kimball*, 42 Vt. 323.

The opinion of the court was delivered by

ROWELL, J. The bill alleges that the estate of the testator is still unsettled in the Probate Court. It contains no allegation that said estate, or any part thereof, has ever come into the possession and control of the said Delos in such a manner that he could, if he would, pass the same over to the orator as prayed. For aught that the bill discloses, all the estate may be needed for the payment of debts and administration expenses. It is obvious

that Delos cannot be called upon to act in the premises until the property has so come to him that it is subject to his control in fulfillment of whatever duty the will imposes upon him in this behalf; and it cannot thus come to him so long as it is properly and legally in the possession and control of the executors in due course of administration. This view alone disposes of the case. But as the main object of the bill is to obtain a construction of the will, and to determine the orator's rights thereunder as against his brother, and as these questions have been fully argued at the Bar, we deem it best to indicate our judgment concerning them.

Whether the codicil of July 14, 1875, revoked the *devises* in the will to the orator, might properly arise in the Probate Court on final decree of distribution; but there may be some doubt whether that court could take cognizance of the other question.

By his will, executed on March 9, 1872, the testator gave to the orator, his son, certain of his estate, including real and personal property. After the making of said will, the orator, by some misconduct, displeased the testator, who thereupon, on July 14, 1875, made the following codicil to his said will:

"Whereas, I, John Bacon, 2d, have, by my last will and testament in writing, duly executed, bearing date March 9, 1872, given and bequeathed to my son, Jerome C. Bacon, certain property therein enumerated; now, I, the said John Bacon, 2d, being desirous of altering my said will in respect to the said legacies, do therefore make this my present writing, which I will and direct to be annexed as a codicil to my said will, and taken as a part thereof. And I do hereby revoke the said legacies by my said will given to my said son, Jerome C. Bacon, and I do give to my son, Delos M. Bacon, all of said legacies *in trust* and as follows: That the same be kept by the said Delos M. until, in the judgment of the said Delos M., the said Jerome C. shall prove himself worthy of receiving the same; and then, and not till then, to deliver the same to the said Jerome C. Bacon.

"It is further my will that if my said son, Delos M., shall not at any time judge it best to deliver said property to my said son, Jerome C., that the same shall be and remain the property of my said son, Delos M., and his heirs forever."

It is conceded that this codicil revoked the gifts of personalty to the orator in the will, but contended that it did not revoke the

gift of realty. It is said that the term "*legacies*," as used in the codicil, does not in legal signification nor in the intention of the testator include the *devises* to the orator in the will. We are mindful of the rule that when a will contains a clear and unambiguous disposition of property, real or personal, the gift is not allowed to be revoked by doubtful expressions in a codicil. 1 Jarman, 181. Also, that the will and the codicil are to be taken together, and construed as one instrument. 1 Redf. Wills, 288. But the real question is, after all, What was the intention of the testator? The word *devise* is used twice in the will; once in the general dispositional clause, probably adopted from the form so long in use in this State, and once, and technically, in the last part of the will, in referring to "land above *devised* to my son, Jerome C." The word *give* is used in the will in all instances in making specific disposition of property, whether real or personal. The word *bequeath* is not used at all. In the codicil the testator recites that by his will he has "*given and bequeathed*" to the orator "*certain property therein enumerated.*" This wording is broad and comprehensive enough to include all the property mentioned in the will and thereby given to the orator; and the words, "*said legacies*," as used in the codicil, we construe to be equally broad and comprehensive. Although the term *legacy* is properly applied to personal property only, yet sometimes, by force of the context, it has been held to apply to realty as well; as, in *Hope d. Brown v. Taylor*, 1 Burr. 268, and *Hardacre v. Nash*, 5 T. R. 716. In *Hughes v. Pritchard*, 6 Ch. D. 24, the words, "*residuary legatees*," were held to designate the persons to take realty not specifically devised. The motive that induced the testator to change his will at all as to the orator, would seem to be sufficient to induce a radical and complete change. In the judgment of the testator, the orator had so misconducted as to render himself unworthy of his bounty; and it seems to have been his purpose to put him on probation, as the most effective if not the only means of winning him to a better life, and his judgment that this could be the more certainly accomplished by making reformation a condition precedent to his right to share at all in the inheritance.

But the most important question still remains. Can a court of equity control the said Delos to any and what extent in respect to the property given him by said codicil? This depends upon whether a trust is thereby created or only a mere power conferred. If the former, it is clear that he can be controlled to a certain extent; but if the latter, it is equally clear that no remedy exists for the non-execution thereof. Trusts are always imperative, and obligatory on the conscience of the party entrusted; while mere powers are never imperative, but leave the acts to be done or not to be done at the will of the party to whom they are given. *Perry Trusts*, s. 248 *et seq.* In most of the cases in which this question has been discussed, the words of the will were precatory, and, in the language of the Vice-Chancellor in *Williams v. Williams*, 1 Sim. n. s. 358, "the real question in these cases always is, whether the wish, or desire, or recommendation that is expressed by the testator, is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion." And, as said by Lord ELDON in *Morice v. The Bishop of Durham*, 10 Ves. 522, 535, "if the party is to take himself, it must be on this ground, according to the authorities, that the testator did not mean to create a trust, but intended a gift to that person for his own use and benefit; for if he was intended to have it entirely in his own power and discretion whether to make the application or not, it is absolutely given; and it is the effect of his own will, and not the obligation imposed by the testament. But if he cannot, or was not intended to, be compelled, the question is not then upon a trust that has failed, nor the intent to create a trust, but the will must be read as if no such intention was expressed or to be discovered in it." And after referring to *Pierson v. Garnett*, 2 Bro. C. C. 38, where, *prima facie*, an absolute interest was given, and the question was whether precatory, not mandatory, words imposed a trust, and other like cases, the Lord Chancellor goes on to say: "But the principle of those cases has never been held in this court applicable to a case where the testator himself has

expressly said he gives his property upon trust." Now the question here is, Has the testator exercised will? Can volition be read out of the whole instrument in the light of the circumstances alleged in the bill? He gives to the said Delos "all of said legacies *in trust* and as follows." Here is a giving upon express trust in apt words. Thus far no doubt can arise. But the testator goes on to declare the trust, and here is where the question comes. But the words of his declaration are not precatory; they are mandatory, commanding that in a certain event named the property shall be given to the orator as the beneficiary. The words in the latter part of the codicil, that if the said Delos "shall not at any time *judge it best* to deliver said property" to the orator, must be construed with the rest of the codicil, and mean no more than the former words that direct the property to be given to the orator whenever in the judgment of the said Delos he shall prove himself worthy to receive the same.

But it is said that here is a limitation over in case the power is not executed, and that "when there is an express limitation of the property over in case the power is not executed, no trust can be implied." Perry Trusts, s. 258. Judging from the cases referred to in support of the text, the author is here speaking of powers of appointment. *Lines v. Darden*, 5 Fla. 51, is such. But there the court held, not that there was no trust because there was a limitation over, but that only a mere power was given. In *Pritchard v. Quinchant*, 1 Amb. 147—the last judgment in which is more fully stated in a note to *Barstow v. Kilvington*, 5 Ves. 596—there was a voluntary deed of settlement to trustees after marriage, to such uses as the husband and wife should jointly appoint, and in default of such appointment, to them for life, and after the decease of the survivor, to the use of all or any of the child or children of them, in such shares and proportions, and of such estate or estates, term or terms, and in such manner and form as the husband should by deed or will appoint, "*and in default thereof*," to the husband and his heirs and assigns forever. The question was, on the settlement as originally drawn, whether the words, "*and in default thereof*," meant in default of appointment by the husband or in default of children by the marriage; and as

matter of construction they were held to mean the former, and that no estate vested without appointment. But the settlement was reformed in favor of the son against a devisee of the husband, according to the letter of instructions for drawing the settlement, and the estates ordered to be settled, subject to incumbrances, to the use of the son and the heirs of his body with remainder over. *Barstow v. Kilvington* is very parallel to *Pritchard v. Quinchant* on the question of reformation, the only question decided in it, though it was said in argument that the settlement had been construed by a court of law. In *Madoc v. Jackson*, 2 Bro. C. C. 588, Lord THURLOW thought that a power of appointment could not be held to suspend the vesting of an interest given in default of appointment. But it is said in 4 Ves. 792, that it had more than once been observed at the Bar that this case turned on a point wholly collateral, though there was some discussion upon that which is the subject of the report. But in *Campbell v. Sandys*, 1 Sch. & Lef. 281, Lord REDESDALE seems to recognize such a doctrine, though he did not there apply it, but referred to cases as holding the same view that Lord THURLOW did. But however that may be, this is not a case of limitation over in default of appointment. It is a case of express trust for the benefit of the orator on condition that he proves himself worthy to have it executed in his favor, of which worthiness Delos is made the judge; and whenever that condition is fulfilled, the orator will become entitled. But it is said that Delos is the sole arbiter, and that his judgment in the premises is final, and cannot be reviewed nor his motives inquired into. It is true, as said in *Clark v. Parker*, 19 Ves. 11, that where a parent gives property to a child with an express condition for the consent of another, the jurisdiction that a Court of Chancery assumes upon that subject, subdivided thus, whether consent has been given or whether it has been reasonably withheld, is very dangerous to the peace of families and the rights of parents. If the court is to inquire whether the person to whom the discretion is given, meaning to act honestly, has made precisely the same decision that the court would have made, it amounts to reading the will as requiring the consent of the court, and it is obvious that many considerations might operate against

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individual consent into which the court could not providently inquire, and which it would be quite competent to the party to refuse to disclose. But there are cases of a different kind where no good reason for withholding consent can be suggested ; and others still stronger where you can discover a bad and vicious reason. A trustee cannot exercise his discretion and judgment from fraudulent, selfish, or other improper motives ; nor can he refuse to exercise them from such motives. *Perry Trusts*, s. 511. And if he acts, or refuses to act, upon such grounds, the court will interfere and give a remedy to the party injured by the fraudulent act or refusal to act. *Bashwood v. Bulkeley*, 10 Ves. 280 ; *Peyton v. Bury*, 2 P. Wms. 626 ; *Baz v. Whitbread*, 16 Ves. 15. A person having a power must exercise it *bona fide* for the end designed. *Aleyn v. Belchier*, 1 Eden, 132, (1 Lead. Cas. Eq. 420). In the exercise of powers, trustees should act with purity of motives, and with a single view to carry out the exact purpose of the power and the intention of the testator. *Perry Trusts*, s. 511 a. But the court will not deprive a trustee of the honest exercise of the discretion that the testator has vested in him. *Sharon v. Simons*, 30 Vt. 458 ; *Mason v. Jones*, 3 Edw. Ch. 524 ; *Ireland v. Ireland*, 84 N. Y. 321.

In this case the court will control the judgment and discretion of the said Delos to the extent, and only to the extent, of compelling an honest and *bona fide* exercise thereof for the end designed by the testator.

We find no error in the decree ; but the same is reversed *pro forma*, and the cause remanded, with directions that the same stand over, with liberty to the orator to amend his bill as he may be advised in respect to said property having become subject to the control and disposition of the said Delos as trustee as aforesaid, and that, in default of such amendment, the bill be dismissed with costs.

FANNY P. SPAULDING ET AL. v. L. A. DREW ET AL.

[IN CHANCERY.]

Married Woman.

The oratrix owned real estate covered by mortgage, with a decree of foreclosure pending. She and her husband deeded it to two of the defendants, with an agreement *with the husband alone*, that they were to pay the decree, and when the property was sold the proceeds were to be applied to pay the amount of the decree, to pay for the care and management of the property, and an indebtedness due from the husband to one of the defendants. The wife did not know what contract had been made with the defendants except as she was informed by her husband, who procured the deed to be executed and delivered it. She entrusted him with her title deed, and understood that whatever arrangement was to be made with the defendants in relation to the property was to be made by him. *Held*, that the proceeds of the real estate should be applied in accordance with the husband's contract; that the rule applies that where one of two innocent parties must suffer by the fraud of a third, he who has reposed a trust in the fraudulent agent ought to bear the loss.

BILL in Chancery. Heard September Term, 1881, Chittenden County. ROYCE, Chancellor, decreed *pro forma* that the bill should be dismissed.

W. L. Burnap and *Hard & Safford*, for the defendants.

Whatever was coming to the wife after paying the decree was a chose in action. *Schouler Hus. & Wife*, 155; *Johnson v. Bennett*, 39 Barb. 237; *Plumur v. Jarman*, 44 Md. 632; *Smilie's Estate*, 22 Penn. St. 130. The chose in action of the wife would fully vest in the husband upon his reducing it to possession. His agreement would perfect his control over the property, and upon their receipt of the avails of the premises, and his subsequent direction, as to the appropriation thereof, would reduce her chose in action to his possession, and effectually deprive her of all interest in the fund. 2 Atk. 208; *Bosoil v. Brauder*, 1 P. Wms. 458; *Honner v. Morton*, 3 Russ. 65; *Dun v. Sargent*, 101 Mass.

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386 ; *Alexander v. Chittenden*, 4 Allen, 342 ; *Pierce v. Thompson*, 17 Pick. 391 ; *Clapp v. Stoughton*, 10 Pick. 462 ; *State v. McClanahan*, 2 Gratt. 280 ; *Kesner v. Trigg*, 98 U. S. 54 ; *Ramsdell v. Craighill*, 9 Ohio, 149 ; *Dixon v. Dixon*, 18 Ib. 113 ; *Tuttle v. Fowler*, 22 Conn. 58 ; *Dardier v. Chapman*, 27 Eng. Rep. 667 ; *Chitty Contracts* (11 Am. Ed.), 225 ; 17 Vt. 190 ; 49 Vt. 63 ; 50 Wis. 200.

Roberts & Roberts, for the oratrix.

The fact that the husband of Mrs. Spaulding to a slight extent managed this property for her, and joined in the deed with her, would certainly not make him her agent to dispose of the proceeds in a way which she did not contemplate or consent to. Rob. Dig. p. 383, s. 53, and cases cited ; *Bent v. Bent*, 44 Vt. 555 ; *Cardell v. Ryder*, 35 Vt. 47 ; 44 Vt. 555.

The opinion of the court was delivered by

ROYCE, Ch. J. This bill is brought to compel an accounting for the money received for certain premises sold by the defendants Drew and Allen to Ira and William P. Russell and Asa B. Witherell on the 28th of April, 1874. The premises were deeded to the oratrix, Fanny P. Spaulding, wife of Milton R. Spaulding, in 1864, and the title remained in her until it was conveyed by the joint deed of herself and husband to the defendants Drew and Allen, on the 10th day of April, 1872. On the 17th of December, 1868, the said Fanny P. and Milton R. executed a mortgage of said premises to Thomas C. Hill to secure the payment of notes amounting to \$3000 executed by Milton R. Spaulding. Hill obtained a decree of foreclosure of said mortgage at the April Term of Chittenden County Court, 1871, which was running at the time the title was conveyed to the defendants Drew and Allen ; and it is agreed that the parties to the deed to Drew and Allen understood at the time it was executed and delivered, that Drew and Allen were to pay that decree, and when the premises were sold they were to reimburse themselves out of the proceeds. The orators claim that Drew and Allen should account for what they received upon the sale of the premises over and above what they

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paid on said decree; Drew and Allen claim that they have fully accounted for such surplus by the application of a part of it to the payment of a debt due from Milton R. Spaulding on account of the purchase of some livery property, and of the rest of it in payment of their claim for services in the care of the premises while the title remained in them, and for their trouble and the risk they took in the management and disposition of them, and of the balance, if anything remained after satisfying said claims, by applying it on an indebtedness from Spaulding to the defendant Drew.

The evidence of Spaulding tends to show that he was never indebted for said livery property; that there was an agreement between him and Drew that they would enter into the business of keeping a livery stable as partners, and that Drew purchased said livery property upon his own credit and put the same into the business as a portion of the capital to be furnished by him, and that they carried on said business after the purchase as partners and not otherwise; but upon a careful examination of the pleadings and proofs we find that there was not any agreement made between the defendant Drew and Spaulding to enter into the business of keeping a livery stable as partners, and that they were not partners in said business; that the business was carried on by Spaulding alone and for his sole benefit; that Spaulding made the contract for the purchase of said livery property and for his sole benefit; that the payment of the purchase money for the same was secured by the note or endorsement of Drew and a lien upon the property was reserved to secure him against loss; that at the time of its purchase it was agreed between Drew and Spaulding that Spaulding should pay the note that was given for the property and save Drew harmless, and upon such payment the property should belong absolutely to Spaulding; that Spaulding took immediate possession of said property after its purchase and has ever since retained the possession and control of the same; and that the debt contracted for its purchase was the debt of Spaulding which it was his duty to pay.

We further find that the agreement between Spaulding and the defendants Drew and Allen was that Spaulding and his wife were to deed the premises to said Drew and Allen, and they were to

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sell the same whenever they thought best, and from the avails were to pay the Hill decree, the debt contracted for the purchase of the livery property, and whatever remained was to be applied in payment for the care, labor and risk of Drew and Allen in the management and disposition of the property and upon the indebtedness of Spaulding to the defendant Drew.

Drew and Allen realized from the sale of the premises, after the payment of taxes and a rebate for rent, \$5,140.51. They paid the Hill decree, amounting to \$3,774.84, and the note given for the livery property, amounting to \$1,111.73, which left a balance in their hands at that time of \$231.25.

The arrangement to deed the premises to Drew and Allen, and the terms upon which they were to take the deed and dispose of the property and account for the same, were all made with Spaulding. The oratrix, Fanny P., did not know what arrangement or contract had been or was to be made with them except as she was informed by her husband. Spaulding procured the deed to be executed, and delivered it. Mrs. Spaulding entrusted her husband with her title deed, and understood that whatever arrangement was to be made with Drew and Allen in relation to the property was to be made by him. They had no notice, except such as the deed and the record furnished, that either Mrs. Spaulding or her children had any interest in the property. They made the arrangement and took the title, believing that it really belonged to Spaulding, and that he had the right to make the arrangement and contract with them that was made.

It is now claimed by the orators that inasmuch as the legal title to the premises was in the oratrix, Fanny P., and she had paid for the same in part out of her separate estate, and no express authority had been given by her to her husband to make any contract in relation to the disposition to be made of the proceeds of the premises, she is not bound by the contract made by him; and that the defendants Drew and Allen should account for all of said proceeds except what was required to pay the Hill decree.

Spaulding had authority to negotiate for the transfer of the title of his wife and to provide for the payment of the Hill decree out of the proceeds of the premises conveyed. Was his authority

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limited to the performance of those acts? If Drew and Allen, at the time the deed was delivered, had paid Spaulding the full amount realized from the sale of the property, after deducting the amount required to pay the Hill decree, his wife would have been bound by such payment. If they could have made the payment at that time, it is clear that they might make it at any subsequent time, unless they had notice not to make it. The note given for the livery property was the debt of Spaulding, and he might have used the money so received to pay that note. Although that might have been a *misappropriation* of the money, as between him and his wife, she could not reclaim the money from the party to whom the payment was made unless he had notice that it belonged to her, or that she had some legal or equitable lien upon it. Here, as we have seen, it was agreed between Spaulding and the defendants Drew and Allen that that debt should be paid out of the proceeds of the premises, and Drew being liable upon the note, they paid it directly instead of paying the money to Spaulding with which he might have paid it; so, as far as the rights of the orators are concerned, it stands for consideration as it would if the defendants had paid the money to Spaulding and he had used it in payment of the livery property debt.

In *Hern v. Nichols*, 1 Salk. 289, Lord HOLT said that where one of two innocent parties must suffer by the fraud or misconduct of a third, he who has reposed a trust and confidence in the fraudulent agent ought to bear the loss. Spaulding had authority from his wife to negotiate with the defendants Drew and Allen in relation to the conveyance to them of the premises. That authority would include the right to contract with them as to the terms upon which the conveyance should be made, and how and in what manner payments should be made. The arrangement that was made constituted the consideration for their agreement to take the conveyance and upon which they did take it. Mrs. Spaulding reposed the trust and confidence in her husband that is spoken of by Lord HOLT, to care for and protect her interest in the proceeds of the property, but instead of protecting her interest he made the agreement and arrangement that we have found he did make. From the authority confessedly conferred upon Spaulding, the de-

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defendants Drew and Allen might well believe that he had authority to make the arrangement that he did make, and were legally justified in acting upon that belief. In deciding upon whom the loss must fall, the rule laid down by Lord HOLT, and which has ever since been acknowledged law, settles it upon the party who reposed the trust and confidence in Spaulding.

From our examination of the case, as developed by the pleadings and proofs, we have failed to find that the orators, or either of them, have any equity that is superior to the claim that is made by the defendants Drew and Allen. The payment of the Hill decree and the debt incurred for the purchase of the livery property by the defendants Drew and Allen was, to that extent, a legal accounting by them for the proceeds of the premises conveyed to them by Spaulding and his wife. Drew and Allen should account for the balance of \$231.25 that remained in their hands after paying said debts. The amount they are reasonably entitled to receive for their care, trouble and expense in the management and disposition of the premises should be ascertained and paid out of said \$231.25, and what shall remain of said sum, if anything, should be applied on the indebtedness of Spaulding to Drew, if any such indebtedness should be found; and if said sum shall not be required for either or both of said purposes, a decree should be entered for the orators for the amount that may so be found in their hands not so accounted for.

The *pro forma* decree dismissing the bill is reversed, and cause remanded with mandate.

 Clark v. Downing.

JOHN CLARK v. OSCAR DOWNING.

Trespass. Assault. Replication de injuria. Evidence.

1. Action, trespass; pleas, 1st, general issue; 2d, *son assault demesne*; 3d, defence of defendant's possession. Replication to the 2d and 3d pleas *de injuria*, without justification under a search warrant. *Held*, that the search warrant was not admissible evidence.
2. It may be an assault if one strike a horse attached to a wagon in which another person is sitting.*

TRESPASS for assault and battery. Pleas: 1st, general issue; 2d, *son assault demesne*; 3d, defence of the defendant's possession. Trial by jury, December Term, Orange County, POWERS, J., presiding. Verdict for the defendant.

The third plea set forth that the plaintiff's horse was wrongfully in and upon the defendant's land doing damage, &c.; that the defendant requested the plaintiff to take away and remove the horse; that the plaintiff refused so to do; that the said beating of the horse, &c., was done in defence of his said land, in order to remove said horse, doing no unnecessary damage. Replication to the second and third pleas *de injuria*, without justification under a search warrant.

On trial the plaintiff's evidence tended to show that five turkeys had been stolen from his barn on the night before the 23d of August, 1880; that the plaintiff had reason to believe and did believe that the defendant had stolen them; that he procured a search warrant in due form of law, and put it into the hands of a sheriff to serve; that the sheriff took the plaintiff and his two daughters with him to identify the property if found, and went to the defendant's house; that the defendant upon their arrival in-

* See *Dodwell v. Burford*, 1 Mod. 24; Addison Torts. s. 790, 797; and *Collins v. Renison*, Say. Rep. 138, stated in *Gregory v. Hill*, 8 Term, 299, where the overturning of a ladder on which the plaintiff was standing was held unjustifiable, although the ladder had been erected by the plaintiff on the defendant's own land.
—RKP.

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vited the plaintiff and his daughters into the house ; that plaintiff did not go in, but hitched his horse to the fence near the house ; that the sheriff informed the defendant what his business was, and at this he became enraged at the plaintiff, and used violent language towards him ; that the sheriff, plaintiff and defendant went in company to the defendant's barn yard, and then the defendant refused to allow the plaintiff to aid in searching his barn with the officer. Upon this the plaintiff inquired of the officer if he had not a right to be there to identify his property. The officer then told him to go back to his team. He did so ; and in about thirty minutes the defendant and sheriff went down where the plaintiff was, and immediately the defendant caught hold of the plaintiff's shoulder, twitched him around, and threw him down upon the ground. At this time the defendant's wife came out of the house, took hold of her husband and told him not to hurt the plaintiff. Whereupon the defendant told him to leave his premises ; and the plaintiff replied that he would as soon as he could ; and he immediately started for his horse, unhitched it, and he and his daughters got into the wagon, and were going away, when the defendant caught hold of the horse, kicked it, and struck it over the back several times with a board. The defendant's evidence tended to show that he ordered the plaintiff away from his premises before he went to the barn, and to contradict the plaintiff's testimony.

The plaintiff offered said search warrant and officer's return ; to the admission of which the defendant objected, on the ground that the plaintiff did not plead it in justification ; and the court excluded it. The plaintiff requested the court to charge the jury, that if they found that when the defendant ordered the plaintiff to leave, and he was using all reasonable diligence to leave, and had got into his wagon with his daughters, and was going away, and the defendant, while the plaintiff was in the wagon and in the act of leaving the defendant's premises, did strike the plaintiff's horse, as plaintiff's testimony tended to show, this would be an assault upon the plaintiff, for which he would be entitled to recover. The court refused so to charge ; but did charge that beating the horse was an aggravation of the assault upon the plaintiff, if he was assaulted ; but as an independent act, it was not a personal assault

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for which alone recovery could be had ; that under the declaration recovery could be had for beating the horse only in case the jury found the plaintiff was personally assaulted.

A. M. Dickey and *G. A. Dickey*, for the plaintiff.

The court erred in charging the jury. Striking the horse was an assault. Hilliard Torts (4th Ed.), 192. Striking one's cane while in his hand is an assault. 3 C. & P. 373 ; 1 Dall. 123 ; 1 Hill (N. Y.), 46.

R. M. Harvey and *J. R. Darling*, for the defendant.

The search warrant under the pleadings not admissible. 52 Vt. 645 ; 47 Vt. 717 ; 2 Wm. Bl. 1165 ; 5 Cow. 181 ; 12 Mass. 505. Striking the horse not an assault. 22 Barb. 94 ; 43 Ind. 146.

The opinion of the court was delivered by

ROYCE, Ch. J. This was an action of trespass for an assault and battery. The first exception taken was to the ruling of the court excluding the search warrant as evidence. The plaintiff claims that under his replication of *de injuria* it was admissible.

The replication of *de injuria* puts in issue all the material allegations of the plea. If the plaintiff wished to avail himself of the search-warrant as a justification, he should have alleged it in his replication, so that an issue might have been made upon that allegation. There was no error in excluding it. Chit. Pl. 564 ; *George v. West*, 52 Vt. 645 ; *Braley v. Walworth and Burnham*, 47 Vt. 717.

The only other exception taken was to the refusal of the court to charge as requested. The evidence referred to in the exceptions, and upon which the request was predicated, and the question of what in law constitutes an assault, have to be considered in deciding whether the request should have been complied with or not. It appears that the evidence as to what transpired at the time and upon the occasion when it was claimed that the assault was committed was conflicting, and the request was based upon the supposition that the jury might find the facts as the plaintiff's evidence tended to show.

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X Admitting that the jury might so find, did the striking of the plaintiff's horse constitute an assault upon the plaintiff? It is not necessary to constitute an assault that any actual violence be done to the person. If the party threatening the assault have the ability, means, and apparent intention, to carry his threat into execution, it may in law constitute an assault. The disposition, accompanied with a present ability to use violence, has been held to amount to an assault. Where violence is used it is not indispensably necessary that it should be to the person. It was decided in *Hopper v. Reeve*, 7 Taunt. 698, that the upsetting of a chair or carriage in which a person was sitting was an assault; in *Martin v. Shoppe*, 3 C. & P. 373, that riding after a person at a quick pace and compelling him to run into his garden to avoid being beaten was an assault; that the striking of the horse upon which the wife of the plaintiff was riding was an assault upon the wife. 1 Stephens, N. P. 210.

+ An assault is defined in *Hays v. The People*, 1 Hill, 351, to be an attempt with force or violence to do a corporal injury to another. The striking of the plaintiff's horse in the manner that his evidence tended to show would probably result in a corporal injury to him; hence, the request should have been complied with.

The case should have been submitted to the jury for them to find whether the striking was as the plaintiff claimed it to have been, or in the manner and for the reasons indicated in the defendant's plea.

Judgment reversed, and cause remanded.

Haskin v. Haskin.

ALVIN HASKIN v. HIRAM J. HASKIN AND EUNICE HASKIN.

[IN CHANCERY.]

A bill having been brought to foreclose the defendant's equity of redemption in certain premises, for an accounting of the profits and to have the defendants enjoined from prosecuting proceedings in insolvency; the orator having offered in his bill to pay whatever should be adjudged due either of defendants; the defendant wife having claimed that \$560 was due her from the orator, and set forth her claim by answer; the court having found from the testimony in her favor; *held*, that she was not entitled to active relief; that she must seek her rights by *cross-bill*, or upon the injunction bond; but that the bill be dismissed unless the orator pays, within some short time, the sum found due.

BILL in chancery. Heard on bill, answers and testimony, September Term, 1881, Franklin County. ROYCE, Chancellor, decreed a foreclosure and that the injunction be made perpetual. The defendants filed separate answers. The said Eunice is the wife of said Hiram J. Her claim against the orator and the purpose of the bill are stated in the opinion. She insisted in her answer that all matter between her and the orator should be adjudicated in the Court of Insolvency, where a petition was pending signed by defendants against the orator.

J. A. Fitch and *H. S. Royce*, for the orator.

C. G. Austin and *H. C. Adams*, for the defendants.

The opinion of the court was delivered by

TAFT, J. The bill in this case prays for the foreclosure of the defendants' equity of redemption in the premises described in the bill, an accounting for the profits while in their possession, and the defendants enjoined from prosecuting certain proceedings in insolvency against the orator. No objection is made by the defendants to a foreclosure and accounting, but the controversy in the case is in regard to the sum of five hundred and sixty dollars,

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which the defendant Eunice claims was loaned by her in the spring of 1880 to her husband, Hiram J., her co-defendant, and the orator, the latter claiming that it was advanced to Hiram J., and upon his credit only. The orator offers in his bill to pay the defendants, or either of them, any sum which may be adjudged due her. Upon an examination of the testimony the court are of the opinion that the orator is indebted to the defendant Eunice in the sum named; that it was advanced by said Eunice for the purpose to which it was applied at the request and upon the credit of the orator and upon his promise to repay it to said Eunice; and we therefore adjudge that there is due from the orator to said Eunice in respect to said sum of money the sum of five hundred and sixty dollars, with interest since the 7th day of April, 1880.

The finding of fact in respect to said sum of money relieves the case of any controverted legal question, and, although we find the same due the defendant Eunice, no active relief can be given her, and she must be left to seek her rights in a court of law, by a cross-bill, or upon the injunction bond, in this cause.

The *pro forma* decree of the Court of Chancery is reversed, and the cause remanded, with a mandate that if the orator pays to the defendant Eunice the sum above named, with interest and costs of this suit, within some short time to be limited by the chancellor, a decree be entered for him in accordance with the prayer of the bill, and that in default of such payment the bill be dismissed with costs and the injunction dissolved. The orator takes no cost, and pays the defendant Eunice her costs.

LUCRETIA PERKINS v. JOHN W. WEST.

Warranty Deed may be a Mortgage. Parol Evidence Admissible to prove it. Trespass. Notice. Put on Inquiry.

1. It is always competent for the grantor in possession to prove that a deed absolute in form is a mortgage.
2. The possession of the mortgagor, occupying the barn with her hay, grain and cattle, with no record title, having deeded to the mortgagee with a parol agreement to re-deed on payment of interest and principal within five years, *is superior to that of the grantee of the mortgagee taking actual possession during the temporary absence of the mortgagor; and the use of force to exclude the mortgagor is a trespass.*
3. Possession of the premises by the grantor is sufficient to put a second grantee on inquiry; and he is affected with notice.

TRESPASS. Trial by jury, April Term, 1881, Lamoille County, POWERS, J., presiding. Verdict for the plaintiff.

The plaintiff offered in evidence a deed from Baxter Whitney to Lucretia Perkins, dated August 19, A. D. 1865, and gave evidence to show that the premises conveyed by said deed consisted of about twenty acres of land, and a barn thereon, and that there was no dwelling house on the premises; that she was the wife of Zacheus Perkins; that she and her husband lived on a piece of land near and adjoining the twenty acres; that her husband carried on said twenty acres of land, and used said barn for the purpose of keeping his cattle, hay and grain therein, from the date of said deed until some time in March, 1880; that her husband died in March, 1880; that at the time of his death he resided on said piece of land adjoining said twenty acres and kept his cattle and hay in said barn; that after the death of her husband she continued to reside on said land adjoining said twenty acres of land and to keep said cattle and hay in said barn until the 10th day of April, 1880; that on said 10th day of April, when there was no person or persons in said barn, the defendant went to said barn and commenced to throw a pile of manure out of the stable in said barn; that she went to the barn and told the defendant to stop throwing said manure out, and he refused to do so; that she then went out and sent for her son, and while she was gone the defendant turned said cattle out of said barn; that her

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son came and requested the defendant to stop throwing said manure out; that defendant requested her son to leave the barn and he neglected so to do. The defendant then took hold of her son and threatened to put him out; that she took hold of her son for the purpose of separating them, and that the defendant then struck her; that defendant requested her to leave the barn, and she neglected so to do; that she took hold of a pin to hold on to so as to prevent the defendant from removing her from said barn, and that the defendant then struck her on her arm, bit her finger and pushed her out of the barn, and she claimed to recover in this action for injuries received by said striking, &c.

The defendant offered in evidence a warranty deed of said twenty acres of land and barn from the plaintiff and her said husband to William G. Bassett, dated June 8th, 1878, and a warranty deed of the said premises from said Bassett to Marietta West, wife of the defendant, dated January 24, 1880; that he and his wife lived on a farm adjoining said twenty acres, and that he had children living, and that said Marietta West was the mother of his said children, and gave evidence tending to show that on the 10th day of April, 1880, by the direction and approval of his said wife, he went to said barn for the purpose of throwing the manure out of said stable and making room in said stable to put his oxen therein; that while he was so doing, the plaintiff came to the barn and requested him not to throw said manure out, and then left the stable; that while she was gone, for the purpose of convenience in throwing said manure out he turned said cattle out of the stable, and proceeded to throw said manure out; that while he was so doing, the plaintiff's son, Elbridge Perkins, came into the stable, and struck him with a piece of board across his hips, and threatened to strike him with a milking stool; that the defendant requested said Elbridge to leave the stable, and told him if he did not leave he should put him out; that said Elbridge refused to leave and he took hold of him for the purpose of removing him from said stable; that while he was so doing the plaintiff bit and scratched him and pulled his hair and beard; that he did not at any time strike or lay hands upon the plaintiff, and claims that he was entitled to the possession of said barn on account of being the husband of said Marietta West, and her directing him to go to said barn for the purpose aforesaid; that he had taken peaceable possession of said barn and had the right to defend that possession and put the plaintiff and her son out of said barn.

The plaintiff then called E. C. White, town clerk for the town of Eden, who testified that he made said deed from the plaintiff and her husband to said Bassett.

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The plaintiff then offered to show by said White that at the time said deed was executed said Bassett agreed with the plaintiff's husband that he would deed said twenty acres of land to her said husband, provided her said husband paid to him a certain note that was secured by a mortgage on said premises within five years, and pay the interest thereon on or before the same should fall due, paid all taxes thereon and carry on said premises in a good husbandlike manner; that her said husband and Bassett requested said White to make a memorandum of said trade, and that he, White, wrote the same down in his memorandum book. Said writing in said White's book was not signed by any person, and the plaintiff also offered the memorandum made by said White in evidence. The defendant objected to the admission of said evidence of White and to the admission of said memorandum. The court admitted all of said evidence, to which the defendant excepted. It appeared that the defendant knew that the plaintiff and her husband had been in possession of said premises as aforesaid.

M. O. Heath and Edson, Cross & Start, for the defendant.

The defendant established his right to the possession of the barn by the deed, and on this showing he was entitled to a verdict unless the plaintiff showed a better right to the possession. This she could not do except by a contract for the sale of the barn that was not in writing. The court permitted her to show this contract by parol evidence, and thereby to recover, when she could not have recovered without such contract being shown.

This was permitting her to recover upon a contract for the sale of real estate that was not in writing. R. L. s. 981; Buck v. Picknell, 27 Vt. 157; Carrington v. Roods, 2 M. & W. 247; Bullard v. Bond, 32 Vt. 355; Hubbard v. Whitney, 13 Vt. 21.

The memorandum was not signed, and the town clerk had no authority in writing, as is required by the statute of frauds, to sign the same, and did not sign it, and it was error to receive it as evidence. The defendant had the right to take peaceable possession of the barn, as he did, and his possession *was lawful*. *Massey v. Scott, 32 Vt. 82; Fuller v. Eddy, 49 Vt. 11; Wilson v. Hooker & Downer, 13 Vt. 653; Lull v. Matthews, 19 Vt. 322.*

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Brigham & Waterman, for the plaintiff.

Parol evidence was admissible to prove that the deed absolute in terms was in fact a mortgage. *Wright v. Bates*, 13 Vt. 341; *Newton v. Fay*, 10 Allen, 505; *Hills v. Loomis*, 42 Vt. 562; *Campbell v. Dearborn*, 109 Mass. 130; *Rich v. Doane*, 35 Vt. 125; 9 Vt. 276; 6 Vt. 448; 37 Vt. 169; 19 Vt. 19; 25 Vt. 273; 15 Vt. 764; 34 Vt. 166; 5 Pick. 181. Lord HARDWICK said in *Walker v. Walker*, 2 Atk. 98, "that such evidence had nothing to do with the Statute of Frauds." *Russell v. Southard*, 12 How. 139.

The opinion of the court was delivered by

REDFIELD, J. Action of trespass for an assault. The defendant pleads, among other things, that the assault was made in defence of his rightful possession.

The plaintiff and her husband had been in possession and constant use of the barn in question for several years, the legal title being in the plaintiff. The barn, with twenty acres of land, was subject to a mortgage to one Bassett; and on the 8th day of June, 1878, the plaintiff and her husband by warranty deed conveyed said premises to said Bassett. At the time of said conveyance the parties to the deed made a parol agreement, and the town clerk at their request made a written memorandum of it, the substance of which was that the plaintiff should continue to possess and occupy the premises and pay the annual interest on said mortgage, and the instalments of the principal as the same became due, and if the plaintiff paid the mortgage debt within five years, the premises should be re-deeded to the plaintiff. Bassett conveyed said premises to the defendant's wife on the 10th of January, 1880.

The plaintiff kept her hay, grain, and cattle in said barn; and while plaintiff's son was temporarily absent from said barn and premises the defendant went in and began to remove the manure therefrom, and claimed to have taken peaceable and legal possession of the same. When the plaintiff and her son were made aware of the defendant's acts and claim, they required the defendant to desist and retire from the premises. The defendant refused,

and persisted in removing the manure and holding the possession to the exclusion of plaintiff, which was the occasion of a collision and of this suit.

I. The plaintiff's title to the premises was that of mortgagee in possession. The possession of the premises by the plaintiff with her hay, grain and cattle was sufficient to put the defendant upon inquiry when he took his deed from Bassett. And he is affected with notice of such legal or equitable rights as the plaintiff possessed.

It is always competent for the grantor in possession to prove that a deed absolute in form is a mortgage merely. And if in fact the deed is *security* for a *debt*, which continues to subsist as a *debt* after the execution of the deed, it is a mortgage whatever be the form of the conveyance. These principles have been so often recognized by the courts of this State that it would not seem that authorities are required. See *Wing v. Cooper*, 37 Vt. 169; *Bigelow v. Topliff*, 25 Vt. 273; *Graham v. Stevens*, 34 Vt. 166; *Wright v. Bates*, 13 Vt. 341; *Rich v. Doane*, 35 Vt. 125.

II. The charge of the court in substance, that if the plaintiff was occupying the barn with her cattle, and hay and grain, the temporary absence of the man having charge of the cattle for the plaintiff did not leave the premises *vacant*; but if the plaintiff had fulfilled her contract with Bassett she was rightfully and legally in possession, and the intrusion of the defendant into the barn tortuous and wrongful, was in accord with the law as settled by repeated decisions of our courts.

Judgment affirmed.

Durant v. Pratt.

L. L. DURANT v. H. J. PRATT, J. J. PRATT AND E. CARDELL.

[IN CHANCERY.]

Estoppel. Master. Practice.

1. The orator having brought a bill to foreclose his mortgage, the defendant, J. J. P., owning a prior mortgage securing two notes, one for \$100, and the other for \$1400, is not *estopped* from proving the true amount of his mortgage, by reason of having testified on the question of alimony in a divorce case in which he was a party, that his mortgage amounted to only \$100, although the orator was his attorney at that time, and relying on the truth of the testimony, advanced money, and took his mortgage; and this, on the ground that the orator was not the party making the inquiries, and that the defendant had a right to know what was the object of the inquiry, and that his answer would be relied on; and this he could not have known.
2. The master shou'd have found whether the claim had been paid; but instead of this he reported the evidence and referred the question to the court. The court dispose of the case as though the proofs had been taken under our former practice.*

BILL of foreclosure with a prayer to redeem prior mortgages. Heard on a master's report, March Term, 1881. REDFIELD, Chancellor, decreed that the orator should pay, as a prior incumbrance, the Mann decree, paid by J. J. Pratt,—\$599.18, with interest; and that the J. J. Pratt mortgage, as against the orator was extinguished except the \$100 note. Appeal by defendants.

The master found that the said H. J. Pratt executed a mortgage on the premises in question in 1864 to one Mann; that in 1872 he executed a second mortgage to said J. J. Pratt, securing one note for \$100, and another note for \$1400; that the orator attached the premises and obtained a judgment against H. J. Pratt in 1876; that the Mann mortgage was foreclosed in 1880; that J. J. Pratt paid the amount of the decree; and that H. J. Pratt executed the mortgage to the orator in 1878. As to the questions decided by the court the master reported as follows:

But in absence of direct testimony of fraud or collusion, I find that the defendant H. J. Pratt did have the money and merchan-

* See Randall v. Randall, *ante*, 214.—RER.

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dise charged in said specification, and that the same is a lien upon said premises to the amount of \$668.65, and the interest thereon, in favor of the said J. J. Pratt, unless the court should determine from the following facts that the same had been paid or that the said J. J. Pratt was estopped from setting up the same against the orator as a prior incumbrance.

At the March term of Washington County Court, 1877, Emma C. Pratt, wife of J. J. Pratt, was granted a divorce from the said J. J.; and on the hearing, the question of alimony became an important matter; and the said J. J. Pratt was examined on oath as to his property. Mr. Durant, the orator, was the attorney of J. J. in that proceeding. At this time H. J. Pratt was indebted to the orator, and also to Randall & Durant, of which last claim the orator was the assignee.

Previous to this time and in April, 1874, the said Durant, as solicitor in the suit for foreclosure of Geo. W. Mann v. H. J. and J. J. Pratt and Randall & Durant, drew the answer of the said J. J. Pratt, filed in that cause, in which the said J. J. Pratt sets forth that his claim under his mortgage against the said H. J. would not exceed at that date, \$700.

A large number of witnesses were introduced by both the orator and defendants, as to what the defendant, J. J. Pratt, testified to on the trial of the divorce cause as to his property, and especially as to his claim against his brother, H. J. Aside from the orator, there were several witnesses who were present, and heard the said J. J. testify, who were interested in knowing the extent of the claim against H. J. It is conceded that the said J. J. testified as to a note he had against his brother of \$100, secured by mortgage. It was claimed on the part of the defendants that the said J. J., after enumerating certain property, said he had a note of \$100 secured by mortgage against his brother and an unsettled book account.

But I find that the said J. J. Pratt testified at the March term aforesaid, when examined,—whether intending to withhold some portion of his estate or from misunderstanding the purport of the inquiry put to him—[stated] that his brother, H. J., owed him a \$100 note secured by mortgage, and that he made no other claim against his brother on that hearing. I further find that in all transactions with the said Hiram J. since that time, the orator has relied upon and acted upon the faith of the testimony of the said J. J. as to said H. J.'s indebtedness to him aforesaid, and has made advances of money, raised money to pay the balance of bail, and performed services for the said H. J., upon the understanding aforesaid, and that the said J. J. or H. J. Pratt never claimed

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to the orator until after the liability to him of the said H. J. had become fixed that the said J. J. had any lien on said premises except the \$100 aforesaid.

Other evidence of payment was submitted to the court; but it is unnecessary to state it.

Fisk and Senter, for defendants.

No estoppel. 25 Vt. 298; 38 Vt. 653; 35 Vt. 214; 30 Vt. 307; 38 Cal. 300; 6 Ind. 347; 73 N. C. 613; 32 Ala. 314.

L. L. Durant and *S. C. Shurtleff*, for the orator, cited on the question of estoppel, *Bank v. Bank*, 53 Vt. 82; *Moore v. Jones*, 23 Vt. 745; *Soper v. Frank*, 47 Vt. 368; 30 Vt. 237; 38 Vt. 578; 39 Vt. 596; 23 Wall. 454; 96 U. S. 716; 97 U. S. 45; 100 U. S. 578; 26 Vt. 287; *Horn v. Cole*, 51 N. H. 287, 300, (an exhaustive case.)

The opinion of the court was delivered by

TART, J. This case was heard on a master's report. But one question is made in the case, and that is, whether there is more than one hundred dollars due the defendant, J. J. Pratt, under the mortgage dated May 31, 1872.

The master reported that a valid claim did exist under said mortgage, in addition to the one hundred dollar claim, amounting to six hundred and sixty-eight dollars and sixty-five cents, which, with interest, was a lien on said premises in favor of J. J. Pratt, "unless the court should determine from the reported facts that the same had been paid, or that the said J. J. Pratt was estopped from setting up the same, against the orator, as a prior encumbrance." On the facts reported no estoppel is shown. *Hackett v. Callender et al*, 32 Vt. 97, is decisive against the orator on this question. In that case it was held that where a person was inquired of in respect to a matter in which his answer might affect his pecuniary interest, he had a right to know that the person had an interest which entitled him to make the inquiry, what the object of the inquiry was, and that the answer would be relied upon.

The case at bar lacks all these elements. The orator was not

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the party making the inquiries in reply to which the information was given ; at the time he had no interest in the premises, and the defendant could not have supposed that the orator was asking for information with reference to his rights, for he had none. The orator cannot stand upon the ground of an estoppel.

The master should have reported whether the claim had been paid or not. Instead of so doing, he has reported the evidence tending to show such payment, and refers the question to the court. No exceptions were taken to the report, and we think it proper, under our practice in chancery, for the court to pass upon the evidence, and find the fact proven or not proven, the question being submitted to us upon the evidence. It will be disposed of as though the proofs had been taken under our former practice. We are, considering the evidence, clearly of the opinion that the note was paid and extinguished.

The decree is affirmed, and cause remanded.

B. S. HASTINGS AND QUINTON COOK v. H. C. BELDEN, H.
C. IDE AND A. J. HYDE.

[IN CHANCERY.]

*Attorneys. Misjoinder of Parties. Statute of Limitation not a
Meritorious Defence. Demurrer.*

1. When a demurrer, alleging several causes, is sustained in some and overruled in others, a new cause may be assigned *ore tenus*; thus, when want of equity and a misjoinder of one party are alleged, the misjoinder of other parties may be assigned orally.
2. In a bill in equity to enjoin the prosecution of an action brought on a promissory note, the defendants, B and I., were the attorneys in said action for defendant, H., and were joined with him in this bill. *Held*, a misjoinder, as there was no claim that the attorneys acted fraudulently.

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3. But the bill is not demurrable on the ground that it appears that the orators had a defence at law; namely, the Statute of Limitations, as it is not a meritorious defence.
4. The prayer of a bill to enjoin the collection of a note should be *to reform the note* according to the agreement of the parties, where the action has been brought against the signers personally, and the claim is that they acted as agents of a religious organization. The bill should have contained a direct allegation that the orators were liable upon the note.
5. Objection to the joinder of a party with no interest can be made only by such party, and not by one joined with him.
6. When a bill does not merely refer to but makes a certain writ a part of the bill itself, the writ will be used in aid of a defective statement.

BILL in chancery. Heard on special demurrer, June Term, 1882, Caledonia County. Ross, Chancellor, dismissed the bill.

The bill alleged that the orators, during the year 1874, were the trustees of the "Second Universalist Society of St. Johnsbury, Vt.," a religious organization duly formed and existing under the laws; that, as such trustees they were duly authorized to transact most of the business for said society, to borrow and expend money for the benefit and use of said society, and to execute for and in behalf of said society notes or other obligations for money so borrowed; that on the second day of June, 1874, the said society borrowed of the defendant, A. J. Hyde, \$315; that the orators, as such agents or trustees of said society, made and executed a promissory note for said sum to said defendant Hyde, payable on demand, which note the said orators intended to execute in such a way as to bind the society aforesaid, but not to bind themselves, or either of them, individually; that said defendant Hyde took and accepted said note as the note of the said society and not as the note of the orators, or either of them; that Hyde intended to take and accept said note as that of the said society, as aforesaid. The orators say that said note is in the hands of the said Hyde, or of his attorneys, of record and in fact, viz.: the defendants, Henry C. Belden and Henry C. Ide, partners in business under the firm name and style of Belden & Ide, and the orators cannot give an exact copy of said note, but they ask the defendants to give an exact copy of said note in their answer; that said loan was made by said Hyde solely upon the credit of the said society and not upon the credit of said orators, or either of them; and the money so borrowed of said Hyde was used and expended by the said society for its own benefit and use, of all which defendant Hyde had full knowledge; that from the date of said loan up to the time of the grievances hereinafter set forth, the said Hyde treated said loan as made to the society and not as made to the orators, or either of them; and interest has been paid, as the orators are informed and believe, upon said loan to said Hyde, or to his agent; that at the time said money was loaned by said Hyde to said society, as aforesaid, said society was financially responsible, and it continued to remain so up to about 1879, when it became heavily involved, and is now practically insolvent; that they were not informed until a short time before the commencement of a suit at law against them (the orators), as hereinafter set forth, that said Hyde purposed or intended to hold them, or either of them, responsible for said loan.

Hastings v. Belden.

On or about the 7th day of May, A. D. 1881, the defendant Hyde, through his co-defendants Belden & Ide, sued out of the clerk's office of said Caledonia County, a writ of attachment founded solely, as the orators are informed and believe, upon said note of June 2, 1874, for \$315, against these orators, and returnable at June Term, 1881, Caledonia County Court. And the defendant Hyde and his said counsel now assert that the orators are personally liable upon the ground that the note was signed in such a way as to make it, in law, the note of the orators and not that of the said society, and that the orators cannot make a valid defence. L. C. Woodbury declines to join with your orators for reasons best known to him.

The prayer of the bill was that the defendants "be perpetually enjoined from prosecuting said suit at law, founded upon said note of June 2, 1874, for \$315, against the orators, or either of them, as individuals; that a decree be entered that said note shall hereafter be treated as the parties thereto originally intended it should be treated, viz.: as the note of said society and not of the orators, or either of them; and that your orators may have such further and other relief as the nature of their case may require and to this honorable court may seem meet."

The other facts are stated in the opinion.

Bates & May, for the orators.

The note binds the signers. Wharton Agency, s. 290; Story Agency, 155; Edwards Notes & Bills, p. 83; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 104. But see *Roberts v. Button*, 14 Vt. 195; *Lyman v. Sherwood*, 20 Vt. 42. If the orators cannot make this defence in the action at law, we assert the defendant Hyde should be compelled to treat the note just as he contracted to treat it when he loaned the money. *Adams v. Smilie*, 50 Vt. 1; *Pro. Court v. May*, 52 Vt. 182; *Rutland v. Page*, 24 Vt. 181; *Dickey v. Corliss*, 41 Vt. 127.

The note has been treated as that of the society from its date up to the bringing of the action at law. The defendants should be enjoined from prosecuting this writ at law against the orators. *Wheeler v. Willard*, 44 Vt. 640; 51 Vt. 203, and 52 Vt. 20.

Belden & Ide, for the defendants.

The demurrer should be sustained as to Belden & Ide, as no fraud is claimed against them. 1 Dan. Ch. Pl. & Pr. 299. There is a want of equity. The orators, so far as appears, had a defence at law, namely, the Statute of Limitations. *May v.*

Parker, 12 Pick. 36; *Stephenson v. Davis*, 56 Me. 74; Story Eq. s. 49, n.; 2 Paige, 177.

The opinion of the court was delivered by

Taft, J. The defendants, Hyde, Belden and Ide, have demurred to the bill, setting forth as causes: first, want of equity; second, that the orators can have full relief at law; third, that Woodbury is not a proper party defendant.

I. Under the first cause, the defendants can *ore tenus*, assign as error, any defect in substance. Cooper Eq. Pl. 118; and they claim that the attorneys, Belden and Ide, are not proper parties. We understand the rule to be that attorneys can only be made parties to a suit in equity in cases where they have so involved themselves in fraud, that a court of equity, although it can give no other relief against them, will order them to pay the costs; and that if an attorney is made a party, the bill must pray that he pay the costs, otherwise a demurrer will lie. 1 Dan. Ch. Pl. & Pr. 299; Story Eq. Pl. s. 232. There may be other cases where it would be proper to make them parties, as where they hold deeds, notes, or securities, claiming them adversely to the interests of their clients, and refuse to surrender them. There are no allegations in this bill that Belden and Ide are acting fraudulently, or in any way save as the attorneys who brought the suit sought to be enjoined. A decree against Hyde will afford the orators complete relief. Belden and Ide therefore are not proper parties to the bill, and should be dismissed.

II. The defendants insist that it appears by the bill that the orators have a defence in the suit at law, viz., the Statute of Limitations. We do not think a party should be compelled to plead that statute. It is not a meritorious defence; and it does not appear that the orators desire to avail themselves of it, and until it does we think the point is not well taken.

III. This bill should have been drawn with a direct allegation that the orators were personally liable upon the note. In this respect it is defective. No copy of the note is given, so that the court

cannot determine the question. There are no averments in the bill of how the parties understood the contract, only allegations of the evidence upon that point, viz., of what the parties intended to do, not what they did do; of what the claims of Hyde now are, not whether the facts claimed by him are true. The prayer is not to reform the note, and make it accord with the intent of the parties at the time of its execution; but the relief asked is, that said note should thereafter be treated as the parties thereto originally intended it should be treated, viz., as the note of said society and not of the orators, or either of them; in other words, we are asked to treat the contract as different from what it is. The court have no power to do this. The prayer should have been to reform the instrument conforming it with what was actually agreed upon by the parties.

IV. The third cause assigned is, that Woodbury is improperly joined. There is no allegation that he signed the note in question, but the writ is made a part of the bill, and that showed that he was sued with the orators, and contains an allegation that he signed the note, and the orators alleged that he refused to join with them in the bill. If the writ had been simply referred to, it might not have aided a defective statement in the bill, but it is made a part of the bill, and the allegation in it, that Woodbury did sign it, is sufficient. Woodbury has appeared, but makes no objection to being joined in the suit. The demurrants cannot avail themselves of this objection if it were a tenable one. The objection made by them is, that Woodbury has no interest in the matter,—the joinder of a party with no interest, not a misjoinder of causes of action. Woodbury only can make the objection. Story [Eq. Pl. ss. 237, 525, 544. The decree of the Court of Chancery should be affirmed; but on motion of the orators, it is reversed *pro forma*, and cause remanded as per mandate.

 Doty v. Hubbard.

H. D. W. DOTY, ADMR. OF REBECCA BARNES, v. JOHN HUBBARD.

Mental Capacity. Confirmation. Presumption.

1. In an action of ejectment the question being whether the defendant's grantor had the requisite *mental capacity* to deed, the court instructed the jury : "Whether she had *native business capacity* enough to understand it, or whether she learned from competent sources what would be for her interest, if she got the *capacity by education* at the time . . . that would be enough." "If she had competent advice from others, so that by their explanation she was made to understand," &c. *Held*, no error.
2. The deed was executed on the second day of January, the application to the Probate Court was made on the same day for the appointment of a guardian, and he was appointed on the thirtieth of the same month. *Held*, that the plaintiff was not entitled to a charge that the presumption in favor of business capacity was changed.
3. A guardian cannot *confirm a deed* made by his ward except by following the regulations prescribed by the statute, obtain a license, and execute a conveyance himself.
4. The heirs did not confirm the deed by neglecting to act in the matter.
5. There could be no confirmation without a knowledge of the right to have the contract set aside.

EJECTMENT to recover possession of a dwelling-house and a small piece of land situated in Hyde Park. Trial by jury, April Term, 1881, Lamoille County, POWERS, J., presiding. Verdict for defendant. The deed in question was executed January 2d, 1880. It was sought to be impeached on the ground of the plaintiff's intestate, Mrs. Rebecca Barnes', mental incapacity. She deceased March 24th, 1880, aged 86 years. The application of the intestate for the appointment of a guardian was dated January 2d, 1880; and he was appointed January 30th, 1880. There were four heirs to the property.

The defendant's evidence tended to show that the appointment of the guardian was made at Mrs. Barnes' request, in order to have some one to look after her affairs and interests, as none of her children were situated so they could do so; that Eben and Robert, the only heirs in the State, were present and consented to

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such appointment; that all parties understood that such appointment was made upon Mrs. Barnes' application; that at the time of the execution of said deed, said Rebecca sent for Calvin Campbell, who was her nephew and had assisted her in her business for several years, and who went and was present at the time of the execution of said deed, making no objections; that by his advice, C. S. Noyes, of Morrisville, was sent for and made said papers; but said Noyes testified that said Rebecca could not tell, or at least could not recall all the terms of the contract, and that he had to refer to the defendant's wife and said Campbell for said terms; that two of her four heirs, her sons, Eben and Robert C., approved of said deed and the arrangement thereunder; but the plaintiff's evidence tended to prove the contrary; that said Campbell, after his appointment as guardian, had sanctioned, or at least had not disapproved of said deed and contract. There was no evidence in the case tending to show that Mrs. Barnes' other heirs, aside from her sons, Eben and Robert C., knew anything about, or had anything to do with, the deed and contract between her and defendant and his wife.

The plaintiff requested the court to charge the jury:

"Second. If Mrs. Barnes was, on the 2d of January, 1880, incompetent to make an ordinary business contract, then it is of no importance whether the contract she in point of fact made was one advantageous to her or not, or whether or not she had the advice of old and trusted friends, except as having or not having, that advice may tend to show that she was of sound or unsound mind."

"Fifth. The inquisition of the Probate Court as to Mrs. Barnes' competency, under the circumstances, would change the presumption in favor of business capacity and would cast the *onus* on the defendant."

"Sixth. The guardian not having been appointed until after the contract was completed, no subsequent attempted ratification of the contract by him would be binding or effectual to confirm the deed."

The court charged, in part:

"Did she have mind enough to look out for all the details and minutiae of a contract of that kind that a person under such cir-

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cumstances as she was placed would naturally look out for, and desire to attain ?

" If she did have this capacity herself, without the aid and advice of others, that is enough to make the contract a valid one.

" Moreover if she was not accustomed to doing business and was not by virtue of her own business capacity competent to understand the details of a trade of this kind, if she had competent advice from others, so that by their explanation and advice she was made to understand—or to put it in another way, she received the capacity from the advice and explanations of other persons, that would be enough to make the contract binding. The question is, did she when she finally consummated the contract, do it understandingly ? Whether she had native business capacity enough to understand it, or whether she learned from competent sources what would be for her interest, if she got the capacity by education at the time from competent sources, that would be enough."

" Now, then, I come to the question of ratification.

" If you find that this deed and contract was a voidable transaction, one that Mrs. Barnes herself, if she had so elected, had the right to set aside, on the ground that she had not capacity enough to make it, and that her administrator has the right to set it aside, the question then arises on the claim of the defendant, has that contract and deed been ratified by the persons in interest, representing Mrs. Barnes' interest ? It is not pretended that she ratified it. It is said that she lived along under it, and took the benefit of it, but no person can be said to ratify or confirm an impeachable transaction, unless it appears that he knew it was impeachable.

" This rule is laid down in a good many authorities, that in order to have any line of conduct amount to a ratification or confirmation of any impeachable transaction, it must appear that the party knew that the matter was impeachable. Nobody can be said to have confirmed a transaction that they had no knowledge needed confirmation, or was susceptible of confirmation.

" Now, nothing is shown in reference to Mrs. Barnes, whether she supposed this contract was one that was binding upon her or not,—she lived along under it, and the fair inference from that circumstance would be that she was content.

" Now, how was it with her guardian, her legal representative ? Because it is not questioned but that Calvin Campbell was the legal guardian of Mrs. Barnes from the date of his appointment in January, 1880. Did he understand that there was any ques-

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tion about her capacity to make the contract in the first instance? Did he think and regard and treat this contract as a proper one for her to make in the first instance, and a proper one to be continued by her?

"How was it as to the heirs interested in the estate so far as you hear from them?"

The other facts are stated in the opinion.

Brigham & Waterman, for the plaintiff.

If a party is incompetent to *make* a contract, how can he be competent to *adopt* a contract suggested by another? It would be *another's* contract. There could be no ratification. *Gibson v. Porter*, 6 Gray, 279; 5 Pick. 217; 1 Gray, 434; 6 Met. 421. The guardian cannot convey except he is authorized by the Probate Court. He cannot do indirectly what he cannot do directly. 11 How. 1.

Gleed, for the defendant.

The charge of the court as to the advice of friends, and the effect, was proper. 11 How. 1; *Hovey v. Hobson*, 55 Me. 256; 1 Perry Trusts, 225, 408; 24 Vt. 32.

As to the question of ratification the defendant claims that the contract was such that it ratified itself, or rather at the death of Mrs. Barnes it could not be repudiated. It was a reasonable contract entirely free from fraud, and there is no intimation that defendant had any reason to suppose that Mrs. Barnes was not of sound mind. On the 2d day of January, 1880, the contract was made and defendant entered upon its execution, and supported and nursed Mrs. Barnes until she died, on the 24th day of the following March. The contract was executory until Mrs. Barnes died. It provided for her necessities. The plaintiff cannot restore the consideration to Mrs. Hubbard,—cannot place her *in statu quo*, and therefore he cannot rescind the contract. 1 Parsons Con. 385; *Gove v. Gibson*, 18 M. & W. 623; 9 Ves. 477; 48 N. H. 133; 1 Gray, 437; 44 Pa. St. 9; Kerr F. & M. 299—303; 1 Am. Lead. Cas. 218.

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The opinion of the court was delivered by

TAF^T, J. The plaintiff's exceptions relate to the charge of the court on the second, fifth and sixth requests.

I. The court complied with the second request in its very terms, and in regard to Mrs. Barnes' capacity told the jury that it was proper for her to receive competent advice from others, so that by their explanation and advice she was made to understand the contract; that when she finally consummated it she must do it understandingly, whether she had native business capacity enough to understand it, or whether she learned from competent sources what would be for her interest, if she got the capacity by education at the time from competent sources, that would be enough. No exception was taken to the charge in respect to what constituted requisite capacity in a party to execute a contract. The jury then must have known what capacity was required in this respect, and we think it no error when they were told that it might be imparted to her as the result of education. This principle is recognized in many cases. In *Arnold v. Richmond Iron Works*, 1 Gray, 434, the court speak of the capacity of a person to make contracts, "either by his knowledge or by the aid of legal counsel or such other aid and advice as he may avail himself of," as competent. In *Gratz v. Cohen*, 11 How. 1, in speaking of the capacity of a party and the circumstances under which a contract was made, the court say: "She applied to him, rather than he to her, to make the settlement, and he suggested the advice and aid of her business friends rather than attempting a secret and sudden settlement, and she did consult two intelligent business friends."

II. The fifth request that "the inquisition of the Probate Court as to Mrs. Barnes' competency, under the circumstances, would change the presumption in favor of business capacity, and would cast the *onus* on the defendant," was made upon the assumption that she was under guardianship when the contract was entered into. Such was not the fact. The contract was made on the second day of January, and the inquisition did not take place until the thirtieth of the same month, so that it is unnecessary to

pass upon the question, as the plaintiff is not entitled to a charge upon a state of facts which it is conceded did not exist.

III. The sixth request, "that the guardian not having been appointed until after the contract was completed, no subsequent attempted ratification of the contract by him would be binding or effectual, and would not confirm the deed from Mrs. Barnes to Mrs. Hubbard," was answered by the court's telling the jury that "if the guardian representing Mrs. Barnes was acting honestly, and the heirs of Mrs. Barnes interested in her estate, with full knowledge of the provisions of that contract, neglected to find any fault with it within a reasonable time after it was made, they have confirmed it."

No case directly in point has been cited. The question was suggested in *Gibson v. Soper*, 6 Gray, 279, where the court say, "how far the probate guardian of an insane person can ratify a deed made by his ward, or what acts of the guardian would be evidence of such ratification, it is not necessary to consider." No guardian in this State, except by express authority from the Probate Court, can convey lands owned by his ward, lands held by his ward in trust, or consummate an agreement made by his ward, by conveying land that the ward is under contract binding in law or equity to convey. R. L. c. 125. The legislative power has, with great care, guarded the rights of wards in their real estate. We think it would be in violation of the spirit of our legislation to hold that a guardian may do indirectly, passively, what the law forbids his doing directly, and that it is a safer rule to hold, that in order to confirm a deed made by his ward, while under disability, he must follow the regulations prescribed by the statute, obtain a license, and execute a conveyance himself.

Neither do we think that a confirmation of the deed could be effected by the neglect of those persons, who upon Mrs. Barnes' death became her heirs, to act in the matter. They had no interest in her estate, and could institute no proceedings in relation to it, except through the guardian; and one of them had no knowledge of the transaction until after the decease of Mrs. Barnes.

This latter person certainly ought not to be bound by the acts

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of the others. The defendant's counsel contend that the ratification of the deed was an immaterial fact; that it became so, because upon the death of Mrs. Barnes the contract could not be repudiated, insisting that it was a reasonable one, for necessities, free from fraud; that they had no reason to suppose that Mrs. Barnes was of unsound mind at the time of the contract, and that the consideration could not then be restored, which they contend was requisite to a rescission. The authorities in support of such doctrine are very full; and had the case been submitted to the jury in that view, and the question of ratification excluded, it is possible that the verdict could not be disturbed. The exceptions do not show that all these facts were litigated upon the trial. They were to some extent; but the case was not submitted to the jury upon this theory. These facts may have been found against the defendant, and the verdict rendered based alone upon the ratification of the contract, which would have been error. Such facts may be so varied, and it being impossible for us to know what may be claimed in respect to them, that we do not pass upon the question of what effect the complete execution of the contract would have upon the rights of the parties, leaving that to be considered upon another trial.

Had there been no error in the charge in the respects indicated, we think the jury should have been further told that there could have been no confirmation of the contract unless the parties confirming it had knowledge of their right to have it set aside. *Wade v. Pulsifer*, 54 Vt. 45, and cases cited. For the errors mentioned the judgment of the County Court is reversed and cause remanded.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTY OF ADDISON,
AT THE
JANUARY TERM, 1883.

PRESENT :

HON. HOMER E. ROYCE, Chief Judge.

HON. H. HENRY POWERS,
HON. WHEELOCK G. VEAZEY, } ASSISTANT JUDGES.
HON. JOHN W. ROWELL,

G. F. O. KIMBALL v. R. P. SATTLEY.

Chattel Mortgage. Growing Crops.

1. The owner of land may make a valid chattel mortgage of a growing crop that he has planted, which is superior to the lien acquired by another creditor's subsequent attachment.
2. The mortgagor of a farm, in possession, and after condition broken, may make a valid chattel mortgage of the growing grass thereon, which is superior to the lien acquired by another creditor's subsequent attachment.
3. The description in the mortgage was : "also all the grass and oats and corn now growing on two hundred and thirty acres of said farm," the farm being properly described ; *held, prima facie* sufficient.
4. The words "not exempt from attachment," as used in the act of 1878, but left out of the R. L., were not a restriction or limitation as to personal property that might be mortgaged.
5. R. L. s. 1965, chattel mortgage act, construed.

Kimball v. Sattley.

- TRESPASS for two hundred tons of hay, one hundred bushels of wheat, and five hundred bushels of oats. By consent of the parties judgment *pro forma* was entered for the plaintiff. The facts were agreed on as follows:

November 25th, 1874, the defendant executed a legal mortgage of his farm in Ferrisburgh, in this State, to the National Life Insurance Company, to secure the payment of \$11,000, expressed in promissory notes, which mortgage was duly recorded. The defendant was then and has since been in possession of the farm; and the notes are outstanding and unpaid.

April 14th, 1879, the defendant, by chattel mortgage duly executed and recorded, conveyed certain farm stock and personal property upon said farm to B. W. Field and W. F. Hindes, executors of Abram Sattley's will, to secure the payment of \$420.20. August 7th, 1879, the defendant, by chattel mortgage duly executed and recorded on the following day, conveyed to said National Life Insurance Company said farm stock, subject to said chattel mortgage of April 14th, and also other personal property upon said farm, to further secure a part of its said mortgage debt of November 25th, 1874, then overdue. August 29th, 1879, said National Life Insurance Company purchased said claim of said Field and Hindes, executors, and took and had recorded an assignment of said chattel mortgage of April 14, 1879, securing the payment thereof.

June 21, 1880, the defendant, by a mortgage signed and sealed by him in presence of two attesting witnesses and acknowledged by him before a justice of the peace, conveyed to said National Life Insurance Company certain personal property on said farm, and, as stated therein, "also all the grass and oats and corn now growing on two hundred and thirty acres of said farm," to further secure two thousand dollars of the indebtedness of November 25, 1874, then overdue and secured by mortgage on said farm as aforesaid, which said mortgage of June 21, 1880, contained an affidavit, subscribed by the mortgagor and mortgagee, that it was made for the purpose of securing the debt described in the condition thereof, and for no other purpose, and that the said debt was a just one honestly due and owing from the mortgagor to the mortgagee, and also contained a certificate of a justice of the peace that said affidavit was subscribed and sworn to by the mortgagor before him, and the certificate of a notary public that said affidavit was subscribed and sworn to by the mortgagee before him. And said mortgage of June 21, 1880, was on June 23,

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1880, duly recorded in the records of mortgages of personal property in the town clerk's office in said Ferrisburgh.

September 3, 1880, said Field and Hindes sued out a writ against said defendant on other indebtedness held by them against him, which writ was served by the plaintiff in this suit, who was, when he served it, deputy sheriff. September 4, 1880, the plaintiff, as sheriff, made legal attachment of all the hay and all the grain now in dispute. At the time said writ was served, the hay and grain grown on said farm in the season of 1880 were in the buildings upon the farm. The writ was duly entered in Addison County Court, and at the June Term, 1881, judgment was rendered for the plaintiff therein to recover \$3,357.78.

October 4, 1880, the said Insurance Company, by its proper officer, executed upon the mortgage of June 21, 1880, a writing in the following words: "The National Life Insurance Company hereby consents to the sale of any part or the whole of the hay grown and cut on the farm mentioned in this mortgage, by the said mortgagor, he accounting to said company for the avails of such sale, said avails to be applied upon the debt secured by this mortgage, and said company hereby appoints the said mortgagor its agent and bailee for the purpose of baling and marketing any or all of said hay, he to account for the avails to be applied as aforesaid." On October 7, 1880, this writing was recorded on the margin of the record of said mortgage in the town clerk's office of Ferrisburgh. A part of the hay grown on said farm in the season of 1880 was sold by the defendant, after said writing of October 7, 1880, was executed and recorded, who paid over to said National Life Insurance Company the avails thereof, to be applied according to said writing; and the rest of the hay and all the grain grown on said farm in that season were consumed on said farm by the farm stock mortgaged as aforesaid. After said hay and grain of the season of 1880 had been disposed of and consumed as aforesaid, execution regularly issued upon said judgment of Field and Hindes, and was returned unsatisfied for want of property whereon to levy; whereupon this suit was brought.

Hard & Safford, for the defendant.

The act of 1878 permits the mortgaging of *personal property*, except such as is exempt from attachment. 1 Hill. Mort. (4th Ed.), 7; *Jones v. Richmond*, 10 Met. 481; *Winslow v. Ins. Co.* 4 Met. 306; *Barnard v. Eaton*, 2 Cush. 294, 303. Growing grass is not personal property and is exempt from attachment.

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Jones Chat. Mort. 145, and cases cited; *Washburn v. Burrows*, 1 Exc. 107; *Carrington v. Roots*, 2 M. & W. 248; *Crosby v. Wardsworth*, 6 East, 602; *Jenks v. Smith*, 1 Denio, 580; *Buck v. Pickwell*, 27 Vt. 157, 163. The *hay* attached by the plaintiff was not in existence when the chattel mortgage was given. A *part of it* then existed, and if the intention of defendant was to mortgage both the grass which had grown and which might thereafter grow, he has not properly described the property. Jones Chat. Mort. 155, 482, 483; *Robinson v. Holt*, 39 N. H. 557. As demonstrated above, growing grass is not a crop; but in those cases where the mortgage of a crop has been upheld, it "must be so described as to be capable of identification." Jones Chat. Mort. 56, 138. But if this mortgage purported to convey a right to after-acquired property, it would give only an equitable right to be enforced by taking possession after a demand. *Holroyd v. Marshall*, 10 H. L. Cas. 191. At most, no present interest was conveyed, only a power; an interest does not arise until the power is exercised. *Reeve v. Whitmore*, 4 DeG. J. & S. 1, 18. It will be observed that neither the mortgagor nor mortgagee has taken any action under the mortgage since its execution. A mortgage given to secure a debt overdue is the same as a mortgage to secure a debt payable on demand. A chattel mortgage payable on demand does not become absolute until a demand is made. *Ely v. Cornley*, 19 N. Y. 496; *Belding et al. v. Read*, 3 H. & C. 954; *Toms v. Wilson*, 116 E. C. L. R. 442.

F. E. Woodbridge and Pitkin & Huse, for the plaintiff.

The mortgage of the grass and grain was valid as against the attaching creditor. Jones Chat. Mort. ss. 140, 146, 555, 556; 2 Wait Act. & Def. 172, 173, 217; *Cudworth v. Scott*, 41 N. H. 456. The objection that grass is part of the realty has no force in this case. It is well settled in this State that the mortgagor of real estate in possession after the expiration of the law day is considered as the tenant at sufferance of the mortgagee. He has a right to take and have the grass in case and only in case he is suffered to remain. He may, then, mortgage it. Jones Chat. Mort. ss. 114, 146. Regarding the grass as part of the realty of

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the mortgagor, this mortgage was sufficient in its character and the manner of its execution to convey any interest in realty. The title having passed to the mortgagee could not be revested by the severance of the grass—especially while it remained on the premises. The property would pass by force of the contract and without deed as fast as it was severed. *Yale v. Seeley*, 15 Vt. 157; *Buck v. Pickwell*, 27 Vt. 157; *Fitch v. Buck*, 38 Vt. 683. It passed to the mortgagee as his absolute property in law, for the debt was overdue. No change of possession was necessary, for the mortgagee never owned it as a chattel. *Fitch v. Buck*, *supra*; *Leavitt v. Jones*, 54 Vt. 423.

The opinion of the court was delivered by

VEAZEY, J. June 21, 1880, the National Life Insurance Company held a mortgage on defendant's farm to secure the payment of \$11,000, expressed in promissory notes, then overdue, this mortgage being dated in 1874. It also held on same date, June 21, a chattel mortgage on some stock and other personal property on the farm, as further security for a part of this debt. The defendant was in possession when the mortgages were given, and has so continued ever since, and on the day named conveyed to this company, by a chattel mortgage in form, but executed with all the formality required in the execution of a mortgage of real estate, certain personal property on said farm, and as stated therein, "also, all the grass and oats and corn now growing on two hundred and thirty acres of said farm," to further secure \$2,000 of said indebtedness. This mortgage was duly recorded June 23d, in the records of mortgages of personal property. On the 3d of September, 1880, after the grass and grain had been harvested and stored in barns on the farm, certain creditors of the defendant caused it to be attached as his property. The defendant afterwards disposed of this hay and grain under the authority of the mortgagee, a part by sale, and a part by consumption on the place. Thereupon the plaintiff, who was the attaching officer, brought this suit in trespass and trover against the defendant who was the mortgagor.

The question is as to the effect of the mortgage given June 21.

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It was a good conveyance between the parties; but did it create a prior lien in the mortgagee as against said attachment?

As to the grain described in the mortgage, the mortgagee's lien was superior under the chattel mortgage act; because the owner of land may make a valid mortgage of his crop that he has planted and *before* it is harvested as well as after. This is upon the principle that, although the crop intended to be conveyed is not at the time of the mortgage in actual matured existence and in that form actually belonging to the mortgagor, yet it potentially belongs to him as an incident of other property then in existence and belonging to him. In the language of Chief Justice HOBART: "Land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant." *Grantham v. Hawley*, Hob. 132; *Evans v. Roberts*, 5 Barn. & Cress. 886; Jones on Chattel Mortgages, s. 140, and cases cited in the notes thereto. The doctrine of potential possession is restricted to cases where the property producing the product, growth or increase belongs to the mortgagor, and is not extended to mere possibilities or expectancies of acquiring property without any present interest in it. The Vermont Chattel Mortgage act provided at the time this mortgage was executed that "*all personal property not exempt from attachment . . . shall be subject to mortgage,*" &c. It is contended that this clause, italicised for convenience of reference here, operated as a restriction or limitation as to personal property that might be mortgaged. We think that clause was never intended to have that effect. The object of the act was not to make chattel mortgages lawful, because they were lawful before by the common law, but to make the public record take the place of possession, and thus overcome the rule in this State that a mortgage of non-exempt property, without change of possession, is invalid as against a subsequent attaching creditor or purchaser. The necessity extended only to non-exempt property, and so we think these words were inadvertently and unnecessarily incorporated at first. In the Revision of 1880, they were left out without changing the scope of the act. The general rule is that any property which is capable of absolute sale may be mortgaged.

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Dorsey v. Hall, 7 Neb. 460. Or as expressed by Powell, page 25: "Everything which may be considered as property, whether, in the technical language of the law, denominated real or personal property, may be the subject of a mortgage."

The more important question is whether the mortgage was valid as to the grass, as against this attachment. The plaintiff contends it was not, on the ground that growing grass is not personal property. He claims there is a fundamental distinction between the products of land resulting from the annual labor of man in sowing as well as reaping, and such products as result from natural growth without planting.

Although the cases are not uniform, there is abundant authority holding or recognizing the distinction to the effect that crops, like corn, wheat, rye, potatoes, &c., called *fructus industriales*, are considered as the representatives of the labor and expense bestowed upon them, and regarded as chattels while still growing; and as such go to the executor instead of the heir, and may be seized on execution as chattels, and may be sold or bargained by parol; while growing grass and trees and fruit on trees, called *fructus naturales*, are, in contemplation of law, a part of the soil of which they are the natural growth, and descend with it to the heir, and until severed cannot be seized on execution, and under the Statute of Frauds cannot be sold or conveyed by parol.*

But if the owner of the fee of the land, by a conveyance in writing, sells these natural products of the earth, which grow spontaneously and without cultivation, to be taken from the land, or sells the land reserving them to be cut and removed by himself, the law regards this as equivalent to an actual severance. *Brown v. Frauds*, s. 236. Question is made in the books whether a chattel mortgage of such products by the owner of the land can be

* *Grantham v. Hawley*, Hob. 132; *Evans v. Roberts*, 5 Barn. & Cress. 836; *Jones v. Flint*, 10 Ad. & E. 753; *Dunne v. Ferguson*, 1 Hayes, 541; *Whipple v. Foote*, 2 Johns. 423; *Stewart v. Doughty*, 9 Johns. 112; *Austin v. Sawyer*, 9 Cow. 39; *Cutler v. Pope*, 13 Me. 377; *Bryant v. Crosby*, 40 Me. 21; *Ross v. Welch*, 11 Gray, 235; *Kingsley v. Holbrook*, 45 N. H. 313; *Howe v. Batchelder*, 49 N. H. 204, 208; *Marshall v. Ferguson*, 23 Cal. 65; *Davis v. McFarlane*, 37 Cal. 634; *Bernal v. Hovious*, 17 Cal. 541; *Graff v. Fitch*, 58 Ill. 377; *Bull v. Griswold*, 19 Ill. 631; *Carson v. Browder*, 2 Lea, 701; *Buck v. Pickwell*, 27 Vt. 157; *Bellogs v. Wells*, 36 Vt. 600; *Jones on Chattel Mortgages*, s. 145, and cases cited in note 3.

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considered a severance, in law, *before* the law day has expired. However this may be, we think if an absolute sale operates a severance in contemplation of law, then a chattel mortgage, executed as this was, after condition is broken, must have the same effect; because the established rule in this State is that after the condition is broken the interest of the mortgagor becomes at law absolutely vested in the mortgagee, and he is entitled to immediate possession. *Hagar v. Brainard*, 44 Vt. 294. The mortgagor, if he remains in possession, is only tenant at sufferance, with right of redemption in equity. We regard the condition of this mortgage as broken immediately upon execution. It was given as further security of notes which specified when they were to be paid and which were then overdue. This same mortgagee was then entitled to the possession under the breach of the original mortgage. In such a case no demand was necessary in order to create a breach of the condition of the new mortgage. It does not appear that any extension of time was given; and no implication arises that the terms of the debt were varied.

We think that, although growing grass may be realty, the owner of it and of the land on which it grows may mortgage it as a chattel and that such mortgage is valid between the parties; and that when the mortgage becomes absolute by the non-performance of the conditions thereof before an actual severance of the grass, it operates a severance in law so as to change the grass from real to personal property, and that a record of the mortgage, as required by law in case of chattel mortgages, is constructive notice to third parties after the grass is cut; and that such mortgage and record then constitute a valid lien as against an attachment as a chattel of the mortgagor. *Jones*, s. 146, and cases there cited; *Fitch v. Burk*, 38 Vt. 683; *Sterling v. Baldwin*, 42 Vt. 306; *Cudworth v. Scott*, 41 N. H. 456.

It is not decided that the same result would not follow if the condition of the mortgage was not broken—see *Bank v. Crary*, 1 Barb. (N. Y.) 546—or whether the mortgage must be executed as this was.

The description of the property was *prima facie* sufficient. It is not necessary that the property should be so described as to be

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capable of being identified by the written recital. The description need not be such as would enable a stranger to select the property, but it must point out the subject-matter of the mortgage so that a third person by its aid, together with the aid of such inquiries as the instrument itself suggests, may identify the property covered. Jones, ss. 53-55.

The *pro forma* judgment of the county court is reversed, and judgment for the defendant.

CHESTER KINGSLEY v. FITTS & AVERY.

Implied Warranty in Sale of Accounts. Agent.

1. The rule that there is an implied warranty in the sale of accounts that they are due and owing, is not changed by the fact that the vendee employs an agent to pay the money and get the account ; and when such vendee has brought suit to collect the account and failed in it, he is entitled to recover what he paid for the account, and his reasonable expenses in such suit.
2. The rule that a principal is chargeable with the knowledge of such facts as are known to his agent, is not available as a defence.

HEARD on the report of referees, December Term, 1882, POWERS, J., presiding. Judgment for defendant. The facts are sufficiently stated in the opinion of the court, and in the report of this case, 51 Vt. R. 414, except the following as to the agency found by the referees :

“ Upon the trial Fitts claimed that he supposed Avery was purchasing the account ; but from the evidence and circumstances developed upon the trial we find that Fitts either knew or ought to have known that Avery was acting for some one else in the purchase of said account, although we find that he did not know for whom Avery was acting.”

“ Kingsley asked Avery if the account was all right. Avery said it was ; and if it was not Fitts was good for it. Kingsley then said to Avery that he would pay that for the account if Avery would get it. Avery thereafter saw Fitts and told him that he

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had found a purchaser for the account at twenty-five per cent. discount. Fitts replied that he would not sell it at that price, but would take \$100 for the account. Avery thereafter saw Kingsley again and communicated to him that Fitts declined to sell the account at twenty-five per cent. discount, but that Fitts offered to take \$100 for it. Kingsley said that he would take it at \$100, and requested Avery to see Fitts and get it. Avery thereafter saw Fitts and told him he had found a purchaser for the account at \$100; and in a few days Avery having received the money from Kingsley went to Fitts and paid him \$100 for the account and took it."

"The referees find that when Fitts told Avery he would sell the account at twenty-five per cent. discount if Avery would find a purchaser, neither Fitts nor Avery understood that Fitts was employed to sell the account, and Avery did not at any time offer to sell it. By the language Fitts then used he intended to inform Avery that he would sell the account to any one who desired to purchase it at twenty-five per cent. discount, and he could say so if he pleased; but neither Fitts nor Avery understood that any agency was conferred on Avery in respect to the sale of the account."

C. F. Kingsley and Prout & Walker, for the plaintiff.

Plaintiff can recover on the implied warranty that the account in question was genuine and real; what it purported to be, "due and owing." *Gilchrist v. Hilliard*, 53 Vt. 592.

An unbroken line of decisions from *Beeman v. Buck*, 3 Vt. 58, to *Gilchrist v. Hilliard*, *supra*, holds that case, as well as assumption, is a proper form of action on a warranty. *Vail v. Strong*, 10 Vt. 457; *West v. Emery*, 17 Vt. 583; *Goodenough v. Snow*, 27 Vt. 720; *Pattee v. Pelton*, 48 Vt. 182.

Measure of damages is the amount paid for the account, interest, and costs of attempt at collection. *Coolidge v. Brigham*, 5 Metc. 68; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Potter v. Merchants' Bank*, 28 N. Y. 641; *Geffert v. West*, 33 Wis. 622.

Hard & Safford, for defendant.

Not only do the facts reported utterly fail to show any authority in Avery to represent Fitts, or any pretence by Avery that he had such authority, but the facts and circumstances reported show

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affirmatively that Avery in this business was the authorized *agent of the plaintiff* and so acted.

But, even admitting that at the very time when he received the \$100 of Avery, Fitts knew that Avery had falsely represented to the plaintiff that the account was valid and without set-off; if, as already shown, Avery was the *agent of the plaintiff*, how could Fitts be affected by Avery's fraud? The report shows that *Avery* had the same knowledge of Dyer's set-off that Fitts had; and the knowledge of Avery was, in law, knowledge in the plaintiff. *Wade Notice*, s. 687; *Hart v. Bank*, 33 Vt. 252.

A party who knows the falsity of a representation when it is made cannot complain of fraud, because he is not deceived.

The opinion of the court was delivered by

ROYCE, Ch. J. The referees have found that the account against John M. Dyer (of \$121.61,) which it was agreed by the defendants in May, 1875, should be taken by the defendant Fitts to reimburse him for money due him from Avery, was sold to the plaintiff for \$100; that Fitts received and has retained said \$100; that upon said sale being made the defendant Avery, with the consent of Fitts, ordered said account paid to the plaintiff by endorsing thereon "pay the within account to Chester Kingsley, (Signed) Fitts & Avery"; that the plaintiff brought suit in the name of the defendants against Dyer to collect the account; that Dyer pleaded an offset and recovered upon said plea more than enough to balance said account. Having been defeated in his attempt to collect the account, the plaintiff claims to recover of the defendants the amount he paid for the account and the money expended in his effort to collect it.

It was held in *Gilchrist v. Hilliard*, 53 Vt. 592, that upon the sale of accounts the vendor was bound to make them what they appeared to be—accounts due and owing. The account sold to the plaintiff was not due and owing at the time of the sale; hence there was a breach of the implied warranty of the defendants at the time of their making the sale; and the defendants are liable to make good the loss the plaintiff has sustained in consequence

of such breach, unless they are excused from liability on account of the circumstances under which the sale was made.

The reason why Fitts offered to sell the account at a discount was because he did not want anything to do with Dyer. Neither he nor Avery then thought that Dyer would claim any offset to the account. His offer to sell was an open one ; he was ready to sell to any one who might choose to purchase at the discount named, and so signified to Avery. Neither Fitts nor Avery understood that Avery was employed to sell the account, or that any agency was conferred upon him in respect to its sale, and he did not at any time offer to sell it. By the language used by Fitts he intended to inform Avery that he would sell the account at the discount named to any one who desired to purchase, and he could say so if he pleased. Avery informed the plaintiff that Fitts would sell the account for \$100 ; the plaintiff told Avery that he would purchase it at that price, paid him the money and requested him to see Fitts and get it. Avery's authority was limited to the payment of the money and procurement of the account. If the plaintiff had personally paid the money to Fitts and taken an assignment of the account, there can be no doubt but that he would have been liable upon an implied warranty that it was due and owing.

We are unable to see how the fact that the money was paid by an agent of the plaintiff and the account delivered to him for the plaintiff changes the legal liability of the defendants. The principle that a principal is chargeable with the knowledge of such facts as are known to his agent, is not available as a defense. There was no duty resting upon the plaintiff to make inquiry as to the validity of the account. It is evident that Fitts, when he offered the account for sale, intended to give the purchaser to understand that it was due and owing ; and as it was not due and owing he cannot be permitted to retain the consideration paid for it.

The judgment is reversed, and judgment on the report for the plaintiff for the sum of \$197.10, as found due by the referees, and interest.

R. P. HALL v. R. J. JONES, H. J. DEAN, AND MERRILL BINGHAM.*

Fraud. Effect of Illegal Evidence Though Charged out of the Case.

1. In an action against several parties for fraud in the sale of an interest in two mines, what one of them said, some months after the sale, as to the dishonest character of the transaction, is *narrative*, and not *evidence*, against those who were no present.
2. The plaintiff having purchased of the defendants one twentieth of two mines, and the question being whether the sale was fraudulent, what one of them *said to a third party* who had bought a like interest in the same mines, at a different time, was not evidence against the others, not being present.
3. The error of admitting illegal evidence is not cured by charging it out of the case.

TRESPASS on the case for fraud in selling by the defendants and one Munson an undivided interest of one-twentieth in two certain mines in Nevada. Said Munson was joined as defendant; but there was a *non est* return of the writ as to him, and there was no appearance by him in the action.

Plea, general issue. Trial by jury, December Term, 1876, PIERPOINT, Ch. J., presiding; and verdict for the plaintiff. The sale was in October, 1867. The following in the deposition of one Comins was admitted against the objection of the defendants:

"When he (Munson) came back, I think in 1868, he knew the condition of the mine, knew that it had been 'jumped' and talked about bringing suit to recover it. He had written that he had sold the mine for 30,000 dollars. I asked him if that was so. He would not tell me.

"He said that he had sold it, that he had to do a good deal of engineering to sell it; that they had a good many meetings and he had a story committed to memory so they could not trap him, and he was on his guard at all the meetings to tell the same story. At some of the meetings they had different parties in. He said he was careful that they should not catch him telling different stories. He said he used to attend their prayer meetings and sing, and be as good a Christian as any of them."

In the course of the trial, and after the plaintiff and one other had testified, the plaintiff called as a witness one Douglas, who,

* Heard January Term, 1881.

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about the first of September, 1867, purchased an interest in these mines like that purchased by the plaintiff as aforesaid, and he was allowed against defendant's objection to testify, among other things, to what Munson and Rockwell said to him at and before the time of his purchase from them (but in the absence of the defendants), in respect to the title, location, quality and value of the mines in question, as an inducement for him to make the purchase.

The exceptions stated :

"The court instructed and cautioned the jury to bear in mind that the plaintiff's case rested entirely upon the representations that were made to him at the time he made the purchase, or in the negotiations that led to it, and he could not add to them by showing representations made to other parties upon their purchase of like interests, since the plaintiff was not influenced in making his trade by any representations made to Douglas and others ; and the jury must bear in mind not to mix up what was said to one man with what was said to another ; and that the representations made to Douglas by Munson and Rockwell, as testified to by him, had nothing to do with the case and the plaintiff could not stand upon them."

The other facts are stated in the opinion.

E. R. Hard, for the defendants.

The testimony of Comins was not admissible. *State v. Thibau*, 30 Vt. 100 ; 1 Greenl. Ev. ss. 113, 114. The transaction with Douglas had no legal connection with that with Hall, but was wholly separate and distinct from it, in respect to time as well as identity. And the attempt of the court to charge this part of Douglas' testimony out of the case, does not cure the error of admitting it. *Allen v. Hancock*, 16 Vt. 230, 233 ; *C. & P. R. R. Co. v. Baxter*, 32 Vt. 805, 815 ; *Sterling v. Sterling*, 41 Vt. 80, 91 ; *Hodge v. Bennington*, 43 Vt. 458 ; *State v. Hopkins*, 50 Vt. 316, 330.

A. P. Tupper, *T. M. McLeod* and *D. Roberts*, for the plaintiff, cited as to the admissibility of the evidence, *Beal v. Thacher*, 3 Esp. 194 ; *Gardner v. Preston*, 2 Day, 205 ; *Snell v. Moses*, 1 Johns. 96, 103 ; *Hooker v. Mather*, 7 Cow. 301 ; *Lovell v. Briggs*, 2 N. H. 218, 222 ; *Benham v. Cary*, 11 Wend. 83 ; *McKenny v. Dingley*, 4 Me. 172 ; *Pierce v. Hoffman*, 24 Vt. 525 ; *Eastman v. Premo*, 49 Vt. 355 ; 1 Greenl. Ev. s. 53.

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The opinion of the court was delivered by

REDFIELD, J. This is an action on the case for deception and fraud in selling shares in certain mines in Nevada.

The trial of the case seems in the main to have been considerate and fair; but we think there must be awarded a new trial for certain errors in the admission of testimony. Comins was allowed to testify as to what Munson told him about the transaction several months after the sale to Hall. So that what he narrated at that time was merely *narrative* in its character, and not legal evidence. *State v. Thibau*, 30 Vt. 100; *Greenl. Ev.* ss. 113, 114.

II. The testimony of Douglas as to what Munson told him is obnoxious to the same objection; and the further objection, that the transaction with Douglas was quite a distinct matter from that with Hall, and at a different time. And the attempt to *charge* this testimony out of the case did not cure the error. *Sterling v. Sterling*, 41 Vt. 80; *Hodge v. Bennington*, 43 Vt. 458; *State v. Hopkins*, 50 Vt. 316; *State v. Meader*, 54 Vt. 128. The latter case is criticised as going too far in a dissenting opinion by ROYCE, Ch. J., but the general rule is admitted. In this case it was suggested that other testimony would make *this* evidence admissible; but it is difficult to see how testimony foreign to the issue on trial can be made *evidence* by any additional testimony. So in *State v. Meader*, the court admitted evidence, under objection and exception, that a certain person mixed paint like the fresh paint with which the stolen sled was disguised on Sunday, and but a short time before the sled was found disguised with fresh paint. This was obviously *not evidence*; but counsel averred earnestly that the painter was employed by the respondent to prepare and mix *this* paint on the Sabbath, which, if true, convicted the respondent of perjury. What others had done with paint or with the sled had no bearing on the issue, and in no sense affected the guilt or innocence of the respondent. The Supreme Court thought the admission of the evidence was error.

The fact that respondent committed perjury in denying that he painted the sled to cover his larceny was not a complicated fact made up of several facts, which might require several witnesses

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and several pieces of evidence to establish the *fact*; nor was it questioned that the sled had been freshly painted, and the simple question was, did the respondent do it? There was then no *necessity* of proving what somebody had done, with a strong asseveration by the attorney for the State, that he would bring home the damaging fact to the respondent; and when he fails to do so then inform the court and jury that by some providential accident or by some suspected agency of the respondent the important evidence is not accessible. All this has a tendency to impress a jury, and, especially in a criminal case, may turn the scale against the accused. And where there is no *necessity* of adducing evidence of that character, and it may have worked mischief, there is no *propriety* in receiving it. And the better and safer way is to keep all illegal testimony out of a case where there is no *necessity* and no legal or moral fitness in its being in the case; and not the least benefit of such a rule is that a court thus avoids the vigorous declamation of counsel before a jury of what he will be *able* to prove.

Judgment is reversed and cause remanded.

EDWIN R. CLAY v. OLIVER SEVERANCE; OLIVER SEVERANCE v. EDWIN R. CLAY; OLIVER SEVERANCE v. EDWIN R. CLAY; OLIVER SEVERANCE v. EDWIN R. CLAY.

Bankruptcy. Composition. Surety.

1. A debt is not discharged by composition proceedings under the U. S. bankrupt act, when the name of the creditor and his debt were not p'aced on the schedule of creditors and debts filed in court.
2. The burden is on the party who c'aims that the debt was discharged to prove that the creditor's name was on the schedule; hence, when a referee's report only states generally that the bankrupt compromised with his creditors and that the composition offered by him "was accepted by the several creditors," the court will not *presume* that the plaintiff's name was on the list of creditors and debts, although the plaintiff was one of such creditors.

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3. One having signed a note with two principals, and having been compelled to pay it, may sustain a several action against either one of the principals, and recover the amount paid.
4. C., H. and S., owning the stock of a corporation, on the first of January C. and H. offered to transfer theirs and their interest in the concern to S. if he would release them from all its liabilities, he having some time to consider the matter, and till the first of March to release them. On January 19th he accepted the offer. The company owed C., and he being treasurer and in due course collected \$266.80, and applied it on his account. The transaction was fair and open; proper entries were made on the books. S. did not know of the collection when he accepted the offer; but might have known it; and the referee found that "they a'l knew that the business had been prosecuted during the time, and that changes in the assets wou'd occur." Before the first of March S. learned of the collection; and, on finding fault, C. told him that "he would make it up to him." *Held*, that the contract did not relate back to the time of the offer; and that there was no consideration for the promise.
5. The County Court has no power to recommit the report of a referee after the case has passed to the Supreme Court on exceptions.
6. It is only in exceptional cases that the Supreme Court will remand a case to the County Court with direction to recommit the report for further findings, no application having been made in the court below.
7. Two cases pending between the same parties, the court ordered that the judgments be offset, and execution issue for the balance.

ASSUMPSIT. Plea, general issue. Heard on the report of a referee, June Term, 1882, TAFT, J., presiding.

Two cases were referred to the same referee, and he made but one report. The court rendered judgment for the defendant in each case. After the cases had passed to the Supreme Court on exceptions, the said Severance brought two petitions, one to the County Court, and one to the Supreme Court, to have the report recommitted to the referee for further findings. The petition to the County Court was heard December Term, 1882, POWERS, J., presiding. Petition dismissed. The facts bearing upon the several questions in the cases are stated in the opinion of the court, except as to the claim of \$266.80. As to this the referee found with other facts:

"Early in January, 1874, the referee is not satisfied as to the exact day, Clay and Hammond made a proposition to Severance that if he would clear and release them from all liabilities on account of the Paper Mill Company, including all paper outstanding on which they were holden for money to run the paper mill, they would give to him all their stock and interest in the property of the said Paper Mill Company, subject to the mortgage claims

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thereon." . . . (The offer was accepted January 19, 1874.) "When said arrangement of January 19, 1874, was made, nothing was said as to the assets of the company being the same as they were when the proposition was made early in January. They all knew that the business had been prosecuted during the time, and that changes in the assets would occur; and the referee fails to find that there was any agreement in the arrangement of January 19, 1874, that the same should reach back to the time the proposition was made. Nothing was said about it. The \$266.80 collected of the St. Albans Advertiser Company, January 9, 1874, ceased to be assets of the Paper Mill Company before January 19, 1874."

"There was no secret about this collection. Hammond knew of it the next day, January 10, 1874, and the matter was treated as a company transaction. It did not appear that anything was said about this collection at the time the contract and writings of January 19, 1874, were made, but Severance supposed this claim was outstanding; and the referee is unable to find that Severance then knew of the collection, but does find that Severance could have learned of it by examining the books, and by inquiry at that time; and that he was informed of it before March 1, 1874, the time limited for Severance to procure Clay's and Hammond's release."

Stewart & Wilds and L. D. Eldredge, for Clay.

The obligation on the part of Hammond and Severance to indemnify Clay was joint and several. *Apgar v. Hilur*, 24 N. J. L. (4 Zab.) 812. The non-joinder was pleadable only in abatement. R. L. s. 939; *Hyde v. Lawrence*, 49 Vt. 361; *Hardey v. Cheney*, 42 Vt. 417; *McGregor v. Balch*, 17 Vt. 563; 36 Vt. 31; Chit. Pl. 202. The composition proceedings are no bar, as Clay's name was not on the schedule of creditors. In re *Becket*, 12 B. R. 201; In re *Odell*, 16 B. R. 501; 14 B. R. 481; *Nat. Bank v. Wood*, 53 Vt. 497.

L. E. Knapp and J. M. Slade, for Severance.

Clay having paid the note as surety should have joined the principals. *Babcock v. Hubbard*, 2 Conn. 536 (11 U. S. Dig. 123, s. 426); *Riddle v. Bowman*, 27 N. H. 236. But at most there being two principals, Clay can recover only one-half

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Fletcher v. Grover, 11 N. H. 368; *Henderson v. McDuffe*, 20 Am. 557, and n.; Wood's Mayne Dam. 481, s. 426; *Mills v. Hyde*, 19 Vt. 59; *Stirling v. Forrester*, 3 Bligh. R. 591. Composition proceedings no bar, as it does not appear that Severance was included in the list of Clay's creditors. *Scott v. Olmstead*, 52 Vt. 214.

The opinion of the court was delivered by

VEAZEY, J. Four causes between the same parties were heard together. Two of them were referred, and the referee heard them together and made one report on both. The case *Clay v. Severance* is an action of assumpsit in the common counts with a special count on a promissory note. The case *Severance v. Clay* is also assumpsit in the common counts. Each party pleaded the general issue and composition with creditors under the United States bankrupt law. Severance did not name Clay as a creditor in his statement of creditors and debts filed in the composition proceedings, therefore by the terms of the bankrupt act, section 5015, Revised Laws (U. S.), Clay's debt was not discharged and is not barred by the composition.

The referee does not state whether Clay named Severance in his list of creditors and debts filed in his composition proceedings. The report only shows Clay had compromised with his creditors in bankruptcy. Clay's debt to Severance accrued before Clay resorted to bankruptcy. To defeat this debt it was not enough for Clay to show he had compromised with his creditors; the burden was on him to show he included Severance in his schedule of creditors filed in the composition proceedings, not on Severance to show his name was *not* on the list. The bankrupt act only purports to discharge the debts of the bankrupt to those creditors specified in the schedule which the act made it the duty of the bankrupt to file. Under composition proceedings the bankrupt receives no general discharge. The statement in the referee's report that the composition offered by Clay "was accepted by the several creditors," and "confirmed," &c., was not sufficient to warrant the court in presuming and holding that Severance was named in the schedule of creditors and accepted the

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offer. Upon the report, therefore, both these cases stand as though there had been no composition in bankruptcy.

The specification in each case contained several items. The only item in dispute in the case of Clay against Severance is the item of \$114, which Clay had paid on a promissory note which he had signed as surety for Severance and one Hammond as principal. Severance objects to this item on the ground that Clay cannot maintain a several action against him, Severance, and can only recover in a joint action against him and his joint principal, Hammond. This note, which ran to one Bingham, was proved against Clay's estate in bankruptcy, and in the composition Clay paid the amount named, \$114. No other defence is claimed than as above stated. The question is whether, where a surety for two or more principals pays the debt, the law raises an implied obligation against each principal severally to reimburse the surety, or a joint obligation only.

Brandt on Suretyship and Guaranty, section 178, states the rule as follows: "If the surety is bound for several principals, he is entitled to recover from any one of them the whole of what he has paid. Each of the principals is debtor for the whole of the debt to the creditors, and the surety, being liable for each of them, has, by paying the debt, freed each of them from the creditors' claim for the whole, and consequently has a right to recover the whole amount from any one of them"; and he cites several cases in support of this proposition. In *Apgar's Administrator v. Hiler*, 24 N. J. L. (4 Zab.), 812, the court below charged the jury that whether the original note be joint or several, the liability of the principals to the surety is several; each is liable for the whole amount. The Court of Errors and Appeals in review said: "If the surety is bound for several principals, he is entitled to proceed against each of them for the recovery of the whole of what he has paid. Each of the principals is debtor of the whole debt in favor of the creditor; and the person being surety for each of them has, by paying the debt, liberated each of them from the whole, and consequently has a right to conclude *in solido* against each of them for the reimbursement of the whole of what he has paid, with interest from the day of the demand. This rule pre-

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vails both in civil and common law." In *Dickey v. Rogers*, 9 Martin (La.), 588, it was held that where there are several joint debtors, the surety has the right to call on each of them for the whole amount of his obligation.

In *Overton v. Woodson et al.* 17 Mo. 453, it was held that where two executors or administrators unite in one bond they are jointly and severally liable as principals to indemnify the surety who has been subjected to the payment of money by the default of one of them.

In *Duncan v. Keiffer*, 3 Binney, 126, the court held to the same doctrine in case of a bond between individuals. Baylies on Sureties and Guarantors, 461, says: "Having borne the burden of his principals, he stands, in many respects, in the place of a creditor, and may proceed against one or all of them for the whole amount paid." This was said upon the authority of a case in the 14th Barb. 32, where a surety had paid a joint judgment against two principals and himself. See also Poth. Tr. des Oblig. p. 2, c. 6, s. 7, art. 1, s. 5; Theo. Pr. & Sur. 169, Ed. of 1836; 17 Ves. 22; *Riddle v. Bowman*, 27 N. H. (7 Foster), 236; *Jones v. Fitz*, 5 N. H. 444.

The above authorities do not all meet the precise question in this case, but they show the tendency of decisions so far as they have gone. The rule as above indicated seems to be just, and is in conflict with no authority as far as we have observed. It is in analogy with our decisions so far as the court has had occasion to decide. In *West v. Bank*, 19 Vt. 403, it was held that if one sign, or indorse, a note, as surety for several joint principals, and one of the principals dies, the surety, having paid the debt, may claim a dividend from the estate upon the entire debt, notwithstanding he may hold collateral security for his liability. *Devaynes v. Noble*, 2 Rus. & Mylne, 495.

The well-settled doctrine that a surety is entitled to be subrogated to all the rights and remedies of the creditor, including his securities, against the principal whose debt he is compelled to pay, is said to rest not in contract, but upon principles of natural justice and moral obligation. Fell's Law of Guaranty & Suretyship, 3 Ed. p. 275. Although the form of the obligation of the princi-

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pals to the payee may have been such as to compel the payee to proceed against them jointly, yet they were each bound to see the note paid and thereby release the surety from liability. Having failed in this duty and the surety having paid the debt, we think it accords with sound rules and with authority to hold that the promise raised by implication of law, which is the foundation of the action of assumpsit by the surety against the principal for money paid to his use, is several as well as joint, where there are more than one principal.

The only item in dispute in Severance's specification against Clay is an item of \$266.80. The facts pertaining to this item, as stated in the report, are all material. From them it appears that Clay, Severance and Hammond owned all the stock of the Middlebury Paper Company in January, 1874; and early in this month Clay and Hammond offered Severance to transfer all their stock and interest in the company to him if he would assume their liabilities for the company. He took time for consideration and investigation to see how he could settle with the creditors of the company, and on the 19th of January accepted the proposition. In the mean time the business of the company was going on, and Clay, who was the treasurer, collected, in due course, said \$266.80 from the St. Albans Advertiser Company. When the contract between said parties was closed Severance did not know this account had been collected, but supposed it was one of the assets. Clay had been individually paying out a large amount to the operatives of the company through November and December preceding, for which the company owed him, and when he collected this money he applied it on his account against the company. Severance now claims, under all the facts detailed in the report, that he is entitled to recover this sum of Clay; that the contract under which he took Clay and Hammond's stock and interest should have relation back to the time of the offer and he thereby have the benefit of all the assets of the company at that time, instead of at the time the contract was closed. We think the claim is not well founded. The transaction of collecting this account was open; proper entries were made on the book; Hammond knew of it, and Severance might have known about it; he must have

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known how the business was kept along, and how the operatives were paid, and that the condition of the company as to assets and liabilities was constantly changing; he made no provision for any past operation of the contract, therefore by its terms it applied as of its date; the transaction was quite large, and so far as appears was "open-handed" and fair, all parties standing on an equal footing. We see no occasion or propriety in giving it any different operation from what the parties in terms provided. It appears that Severance was to have until the *first* of March of that year, 1874, to carry out his agreement to get Clay and Hammond released from their liabilities for this company, their stock in the mean time to be held by a trustee; also that after Severance learned of this collection by Clay and before the *first* of March, he found fault with Clay about it, and Clay once told Severance before the first of March "he would make it up to him." Severance now insists he is entitled to recover on the strength of this promise. That depends on whether there was any consideration for it. We think the facts stated in the report fail to show any legal or moral obligation resting on Clay to pay this money to Severance when he made this promise. No other consideration is claimed. It does not appear that Severance relied on it. The inference is the other way. This item should be disallowed.

The other two cases are petitions, one to the County Court, and one to this court, to have the report recommitted to the referee to find and report whether Clay included Severance in his schedule of creditors filed in his composition proceedings. The views above expressed show there was no necessity for recommitment for this purpose. The County Court properly dismissed the petition. It was not made in that court until after the case had passed on exceptions to this court. The report was not then within the control of the County Court. Section 1392 of the Revised Laws provides that when the judgment of a county court upon a question of law is to be revised by the Supreme Court, the original files and papers shall be removed to the Supreme Court.

As to the other petition made to this court. In a proper case this court would remand a case to the County Court with direction to recommit a report for further findings. It would probably be

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only in exceptional cases that this power would be exercised. There is no necessity to exercise it here, and it is doubtful whether it would be exercised in behalf of a party who, situated as the petitioner was, had not made his application sooner.

As to the case of Severance against Olay which was referred, the judgment of the County Court is reversed, and judgment for the plaintiff for the amount found by the referee with interest, less the item \$266.80.

As to the case of Olay against Severance which was referred, the judgment of the County Court is reversed, and judgment for the amount found by the referee with interest. And as to these judgments it is ordered that they be offset against each other, and execution issue for the balance.

As to the petition filed in the County Court, the judgment of that court is affirmed with costs. As to the petition filed in this court, the same is dismissed without costs.

J. C. MATTHEWS v. FRANK LUCIA.

Conditional Sale. Waiver. Demand.

By the conditional sale if the vendee failed to pay the note according to its tenor, he forfeited what he had paid, and the vendor could take the wagon. There was a failure to fully pay ; but the vendor allowed the wagon to remain with the vendee ; and he accepted payments after the last installment was due. Without making a demand he brought suit to recover the balance of the note, attaching the wagon and holding it by virtue of the attachment until the trial commenced, when he entered a non-suit, and claimed to hold it under the written contract. *Held,*

1. If a demand were necessary the bringing of the suit was sufficient.
2. By making the attachment the defendant did not waive his right to the wagon under the conditional sale ; nor, was he estopped from asserting his right.
3. Nor did he waive the causes of forfeiture arising from default of payment by accepting payments after the note was due.

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TROVER and trespass for a wagon. Plea, general issue, and trial by court, June Term, 1882, TAFT, J., presiding. Judgment for the plaintiff to recover the value of the wagon, deducting the amount due the defendant upon the contract. On June 28d, 1879, the plaintiff gave the defendant the following writing :

"For value received I promise to pay Frank Lucia or order eighty-five dollars as follows : ten dollars in cash on receipt of wagon; thirteen dollars in lumber on receipt of wagon; and sixty-two dollars in lumber delivered in Middlebury village on the 1st day of August, 1879. This note is given for a wagon I have this day purchased of the said Lucia, and the said wagon is to be and remain the property of the said Lucia until fully paid, and if not paid as above, the said Lucia may take the wagon without let or hindrance, and I forfeit all I have paid. This is a booted buggy wagon."

A sum remained due upon the note, and the defendant brought suit for it, attached the wagon, and held it by virtue of the attachment until a trial was commenced, when he entered a non-suit, and took the wagon, claiming to hold it under the written contract. The other facts are stated in the opinion.

Stewart & Wilds and *L. E. Knapp*, for defendant.

Where there is a conditional sale the absolute title to the property remains in the vendor until the condition is complied with, and cannot be waived any more than any other absolute ownership of property can be waived. *Jones Chat. Mort.* 26, 29; *R. L.* 1981, 1994; *Benjamin Sales*, 285, s. 320, note, and 785, s. 796; *Child & Benton v. Allen*, 33 Vt. 476; *Blodgett v. Blodgett*, 48 Vt. 32; *West v. Bolton*, 4 Vt. 558.

The general rule is that after condition broken the vendor of a conditional sale has a right under his contracts to resume possession without demand or notice. *Child & Benton v. Allen*, 33 Vt. 476; *Buckmaster v. Smith*, 22 Vt. 203.

And even mortgaged chattels vest in the mortgagee on breach of condition. *Blodgett v. Blodgett*, 48 Vt. 32. See *West v. Bolton*, 4 Vt. 558; *Smith v. Foster*, 18 Vt. 182.

J. M. Slade, for plaintiff.

It is a well settled principle of law that in a conditional sale containing a forfeiture clause upon nonpayment at a certain time

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that receipt of payments by the vendor subsequent to the time mentioned in the contract, and the absence of any request by vendor for payment of the balance due and a refusal by the vendee, is a waiver of the forfeiture. *Fairbank v. Phelps*, 22 Pick. 535; *Fry on Specific Performance*, 409; *Lawrence v. Dell*, 3 Johns. Ch. 28; *Hutchins v. Munger*, 41 N. Y. 156; *Taylor v. Finley*, 48 Vt. 78; 17 Pick. 140; *Marston v. Baldwin*, 17 Mass. 606; *Boyn-ton v. Braley*, 54 Vt. 93.

The opinion of the court was delivered by

ROWELL, J. By the terms of the conditional sale, the wagon was to remain the property of the defendant until the note given for the price thereof was fully paid according to its tenor, the last installment falling due on August 1, 1879, and in default of such payment, the defendant had the right to take the wagon without "let or hindrance," and the plaintiff was to forfeit all he had paid towards it. After the last installment fell due, the plaintiff made, and the defendant accepted and received, payments on the note, the plaintiff retaining possession of the wagon. It is claimed that this was a waiver of all prior causes of forfeiture arising from default of payment, and that it was necessary for the defendant to make demand of payment before he could thereafter take the wagon for non-payment. *Hutchings v. Munger*, 41 N. Y. 155; *Manufacturing Co. v. Teetzlaff*, 13 Reporter, 511; *Taylor v. Finley*, 48 Vt. 78. If this were so, the bringing of the suit by the defendant for the recovery of the balance due on the note, was a sufficient demand.

The attachment of the wagon on the writ in said suit was not a waiver of the defendant's right to the wagon under the conditional sale, nor an estoppel against his afterwards asserting that right in the manner he did. *Child & Benton v. Allen*, 33 Vt. 476.

Judgment reversed, and cause remanded.

L. E. KNAPP v. W. I. FULLER AND FRANK E. SMITH.

Libel.

1. In an action for a libel, where the language used is ambiguous or ironical, the plaintiff's acquaintances may state their understanding as to whom the libelous charge refers, and what it imputes.
2. The defendant, after suit was brought, published another article referring to the plaintiff by name. It was admissible to show the *animus*, the intention, in publishing the first article.
3. Also, what one of the defendants said, a few days after the first publication, manifesting a hostile feeling towards the plaintiff, was admissible.

ACTION for libel. Plea, general issue, with special matter in defence. Trial by jury, June Term, 1881, PIERPOINT, Ch. J., presiding. Verdict for the plaintiff to recover \$200 damages. The facts are stated in the opinion.

McLeod, for the defendants.

It was error to admit testimony as to what witness understood was imputed to the person referred to by the article. That was a question for the jury. 8 East, 427 ; 6 Term, 691.

E. R. Hard, for the plaintiff.

The testimony of Brooks and of Bailey as to whom they understood, from reading the libelous article, it referred to, and what offense was intended to be charged, was competent. 2 Greenl. Ev. s. 417 ; Abb. Tr. Ev. 664, 665 ; *Smith v. Miles*, 15 Vt. 245, 249. It was competent to show by Brooks that Smith, one of the defendants, and (as the testimony shows) the writer of the slanderous item was, at that time hostile to the plaintiff.

The fact of such hostility would bear more or less upon the question, *who* was referred to in the item, and also upon the question of *actual malice*.

Knapp v. Fuller.

The opinion of the court was delivered by

POWERS, J. This was an action for a libel predicated upon an article published by the defendants in the *Addison County Journal*, as follows :

“ One day last week two of our citizens went to the residence of a farmer a short distance from the village on business, and on arriving there went to the door and rapped but received no response ; they rapped a second time and no response ; and a third time with the same result. They then opened the door and walked in, and as they did so who should emerge from the bedroom but one of our prominent officials with a young lady of the house, who being enquired of as to the whereabouts of members of the family, said they were all absent but her. After some conversation our gay Lothario took his leave. Query : Was said official there on *probate* business ? Perhaps it would be in order for him to “ rise and explain,” as many of our people would like to be informed.”

The plaintiff was allowed against the objection of the defendants to prove by his acquaintances who read the above article whom they understood it to refer to, and what they understood the charge imputed by it was ?

It is argued that this evidence could not be received until it had been shown that the witnesses had knowledge of the circumstances happening at or near the time of publication to which the article necessarily referred, and that they got their understanding as to the person referred to from their knowledge of these circumstances. It was not made quite clear in argument what scope counsel intended to give to the above proposition, but the tenor of the argument was that the reader of the publication, in making up his conclusion as to the person aimed at, must exclude from consideration personal information he might possess, drawn from sources not furnished by the article itself, or known to him otherwise and referred to by the article.

There is considerable conflict in the cases touching the admission of testimony of witnesses as to their understanding of alleged libelous language. The authorities are uniform that the meaning is a question for the jury, and the jury are to put themselves as nearly as may be in the shoes of the reader, and from his standpoint determine the character of the language. To determine

this question it is obvious that the language will be construed by the reader, not only with reference to all the facts and circumstances recited in the article itself, but also with reference to such other facts as the writer might reasonably expect to be within the present knowledge of the reader. If an article adopts terms or forms of expression which have a provincial meaning unlike their natural import, and are addressed to persons of the locality where such provincialisms are understood, the writer is bound to expect that his language will be read in its provincial sense.

If a person is known in a locality as having a nickname, or one given him by reason of some oddity of manner, peculiarity of gait or dress, or some official character, and the article refers or may refer to such name or character instead of the true name, all persons reading an article referring to somebody under such name, and knowing who bore the name, would feel well assured respecting the person alluded to. Such name or character are but an *alias* for the person's true name.

But it would not do to say that the jury are presumed to know all the facts known by the reader. The reader having an intimate acquaintance with the person in question, both under his true name and in his official character, can apply an ambiguous reference to its proper object at once. The jury may be, and, practically speaking, naturally would be, a class of persons not intimately acquainted with these facts. They could not stand in the shoes of the witness. And to lay before them the naked fact that a person had some peculiarities that possibly mark him as the one referred to in the article is forcing the jury into [the region of conjecture.

In cases where the mental condition of a person is in question, a non-expert witness may detail facts from which the jury may judge whether the person is insane. He may go further and tell the jury what his opinion is as to his insanity. The jury may add this opinion to the facts detailed, and on the whole form their opinion. There are many cases where the distinction between opinion or understanding and fact is quite shadowy and undefinable, and oftentimes a recital of facts is tantamount to the expression of opinion. The witness familiar with the facts can group

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and combine them into a conclusion that has some value, while the jury less familiar with them will be more likely to give them their proper force if the witness states his conclusion. No danger can arise from this evidence when a cross-examination is open to the adverse party. If the language of the article is unambiguous, there is no room for evidence of the witness' understanding of its meaning. But if it is ambiguous or ironical, if it is the soft impeachment of the coward who is afraid to call men and things by their right names, but prefers by innuendo and insinuation to vilify his victim, it is a case where acquaintances may state their understanding of the language made use of. As ABBOTT, Ch. J., *Bourke v. Warren*, 2 C. & P. 307, says: "It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant."

The doctrine that in such cases the witness may state his understanding of the language used is recognized in 2 Greenl. Ev. s. 417; *Leonard v. Allen*, 11 Cush. 241; *Stacy v. Port. Pub. Co.*, 68 Me. 279; *Smith v. Miles*, 15 Vt. 245; Odgers Libel & Slander, 589, and numerous cases there cited. And the same authorities declare that this evidence may be received to determine the nature of the offence charged by the article.

In the succeeding issue of the *Journal* and after this suit was brought, the defendants published another article referring to the one in question, to the plaintiff by name and to the suit he had brought. This article was put in evidence against the defendants' objection.

"Any words written or spoken of the plaintiff before or after those sued on, or even after the commencement of the action, are admissible to show the *animus* of the defendant." Odgers, 271.

"The second paragraph was admissible to show what the intention of the defendant was in publishing the first." BOSANQUET, J., in *Barwell v. Adkins*, 1 Man. & Gra. 807.

The testimony of Meekin as to a conversation had with defendant Smith a few days after the first publication, in which a hostile feeling towards the plaintiff was manifested, was admitted. One question involved is, what was in the defendant's mind when he published the article? Although his acts and words on that occa-

 Howe's Executors v. Towner.

sion are the best evidence on this point, still if he afterwards gives expression to an ill feeling, that is to be received for what it is worth as pointing to his motive at the time of publication.

Many of the exceptions taken on the trial were abandoned in this court. We find no error in the judgment below, and the same is affirmed.

DANIEL HOWE'S EXECUTORS v. G. L. TOWNER AND OTHERS.

[IN CHANCERY.]

Foreclosure. Description. Demurrer.

The description of the premises in a petition to foreclose a mortgage was, "certain land, situate in Bridport and described as follows: it being our home farm, containing about one hundred and eighty acres." *Held*, sufficient on demurrer; and that the further description, merely referring to certain deeds and records, neither helps nor hurts, and should be rejected.

PETITION to foreclose a mortgage. Heard on demurrer, December Term, 1882. POWERS, Chancellor, overruled the demurrer.

Copy of description of the land as set forth in the petition:

"Of certain land, situate in Bridport and described as follows: it being our home farm, containing about one hundred and eighty acres; and is the same and all the land described in deeds from Royal and Loraine Moseley, viz., to Ellen M. Towner, deed dated December 21, 1865, recorded in book No. 14, page 471; and deed to George L. Towner, dated May 15th, 1868, recorded in book 14, pages 642 & 643 of Bridport town records,—intending hereby to convey all the lands deeded to us, the said Geo. L. & Ellen M. Towner, by the said Royal and Loraine Moseley, except what we have sold and deeded to Fred Swenor."

Lyman E. Knapp, for plaintiff.

Hard & Safford, for defendants.

The opinion of the court was delivered by

ROWELL, J. The mortgaged premises are first described in the petition as the home farm of the mortgagors, containing about one hundred and eighty acres. Stopping here, we think the description sufficiently definite. It means their home farm as it was at the time the mortgage was given, and includes the whole of it. Such a description in the mortgage would certainly convey the whole farm. And it constitutes a pretty definite description, as the boundaries and limits of farms, and especially of home farms, are generally well marked and defined, so that any one acquainted with a farm can readily point it out and locate it. Great particularity of description has not been usual in our practice in foreclosure proceedings. It is quite common, though sometimes very inartificial, to describe the premises in the petition as they are described in the mortgage, without the aid of accompanying averments to help out indefinite descriptions; though in strictness the petition should describe the premises with sufficient certainty to enable the petitioner to point out the premises to the sheriff who serves the writ of possession. That can be done in this case. The rest of the description in the petition neither helps nor hurts what goes before. As matter of pleading it may and must be condemned and rejected, and the first part of the description left to stand without it.

Decree affirmed and cause remanded.

Barnes v. Hanks.

CHARLES BARNES, APPT. v. PHILANDER HANKS' ADMR.

Will. Codicil.

The will contained the following : "If there should be anything remaining of my estate after paying the above legacies, then it is my will that there be paid to the children of the said Martha who may be then living, a sum not to exceed two hundred dollars each, and that the residue and remainder of my estate be divided equally to such of my grandchildren as may be living at the time of such division."

The codicil provided : "It is further my will that each of the children of my daughter, Martha Scott, have five hundred dollars out of my estate, in addition to the amount given to them in my said will."

Held, that the legacies given by the codicil were cumulative or added legacies, and subject to all the conditions of the previous legacies.

APPEAL from the order of distribution of the estate of Philander Hanks made by the Probate Court for the District of New Haven. Heard, December Term, 1882, POWERS, J., presiding. Order *pro forma* affirmed. The will was dated September 25th, 1878; the codicil, February 8th, 1881. Martha Scott was the mother of four children. After paying what was due the widow, who waived the provisions in the will, there were left \$3,262.66, to be divided between eighteen legatees, if the children of Martha Scott were included, all whose legacies amounted to \$8,600, calling the legacies of Martha Scott's children \$500 each. The order of the Probate Court included the children of Martha Scott, and their legacies were called \$500 each. The other facts are stated in the opinion.

Hard & Safford, for the plaintiff.

In the distribution of the personal estate of the testator, November 22, 1882, the Probate Court, although the personal estate was *insufficient*, by more than \$3,000, to pay the absolute and unconditional legacies given in the will treated the legacies given in the codicil to the children of Martha Scott, as *absolute and uncondi-*

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tional, and upon this basis distributed the personal estate between all the legatees, *pro rata*.

Whether the legacies of \$500 given in the codicil to the children of Martha Scott are to be considered as absolute, so as to place these children, as respects these legacies, on equal footing with the unconditional legatees in the original will, or are to be treated as *subject to the same condition* as the legacies given in the will to these same children, viz.: the sufficiency of the estate to pay more than the absolute legacies, is the question to be determined. It is often a question whether a legacy bequeathed by a codicil is payable out of the same fund, or is subject to the same restrictions, as a legacy bequeathed to the same person by the will. If the second legacy is expressly given upon the same conditions, &c., of course the affirmative does not admit of doubt; and the same construction prevails where the legacy by codicil is expressed to be in *addition to*, or in substitution for, the legacy given by the will. 1 Jar. Will, (5th Ed.), 186; *Crowder v. Clowes*, 2 Ves. Jr. 449; 2 Redf. Wills, (2 Ed.), 202.

J. H. Lucia, for the defendant.

The children of Martha Scott are entitled to a legacy of \$500 each, or to share *pro rata* with the other legatees. A codicil is part of the will. 2 Ves. Sen. 242; 4 Brown Ch. Cas. 55; 4 Ves. 610; 1 Redf. Wills, 288. If there be a latter clause repugnant to a former so that one must be rejected, the latter must prevail. 4 Mass. 215; 2 Pick. 463; 2 Jar. Wills, 524; 2 Mass. 56; 11 Pick. 257; 18 Ib. 460; 2 Met. 194; 3 Cush. 372; *Richardson v. Paige*, 54 Vt. 373. Words favorable to the claims of a legatee are to be liberally and beneficially construed. 6 Mass. 169; 2 Redf. 109, n.; 1 Cush. 118. As to the construction to be given the words, "*in addition to*," see 2 Jar. Wills, Rule 18, p. 527.

The opinion of the court was delivered by

ROYCE, Ch. J. This was an appeal taken from an order of distribution of the estate of Philander Hanks, made by the Probate Court. On the 25th of September, 1878, Philander Hanks

executed his will, and on the 8th of February, 1881, he executed a codicil to that will. He disposed of his estate by his will in general legacies to his wife, children and grandchildren. After giving to his daughter Martha Scott and the heirs of her body the sum of \$3,000, he added that :

“ If there should be anything remaining of my estate after paying the above legacies, then it is my will that there be paid to the children of the said Martha, who may be living, a sum not to exceed two hundred dollars each, and that the residue and remainder of my estate be divided equally to such of my grandchildren as may be living at the time of such division.”

In the codicil an additional legacy is given to the children of Martha Scott in the following words : “ It is further my will that each of the children of my daughter, Martha Scott, have five hundred dollars out of my estate, *in addition* to the amount given them in my said will.” The Probate Court treated the legacies given by the codicil as general unconditional legacies, and by its order of distribution placed them upon an equality with the legacies given by the will to other legatees. If the legacy given by the codicil is held to be subject to the condition upon which the legacy given by the will was to become payable, there was error in the order.

A codicil is regarded as a part of the will ; and the will and codicil are to be construed as one instrument ; and a codicil should be so construed, if it can be fairly done, as to make it harmonize with the purposes declared in the body of the will. 1 Redf. on Wills, 288, and cases cited. In *Crowder v. Clowes*, 2 Ves. Jr. 449, the testator by a codicil gave to his niece the further sum of two hundred pounds in addition to what he had given her by his will ; and the question was, out of what fund, and upon what conditions, the legacy given by the codicil should be paid. The Master of the Rolls says that : “ As to codicils, Lord THURLOW has determined that substituted and added legacies shall be raised out of the same fund and subject to the same conditions ” ; and it was so held in that case. The legacies given by the codicil to the children of Martha Scott were cumulative or added legacies. In *May v. May*, 19 Weekly Reporter, 432, it was held that an addi-

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tional legacy is subject to all the conditions attached to the previous legacy unless there are express words to the contrary. There are no such words in this codicil. It appears that the testator made more liberal provision for his daughter, Martha, and the heirs of her body, than he did for his other children and grandchildren; hence, he made the legacies to the children of Martha conditional upon there being any estate after the payment of the legacies given to others. The presumption is that the testator, when he executed his will, believed that his estate would be ample to pay all the legacies; when he executed the codicil he may have thought that there would be a residue to be divided among his grandchildren, and desired to give the children of Martha a larger proportion of that residue than was given them by the will, and so gave them the added legacy.

It cannot be ascertained with certainty from the will and codicil what the intention of the testator was; and there is very little aid that can be derived from any circumstances shown by the record. It cannot be found that it was the intention of the testator by the codicil to cut down the general and unconditional legacies that he had given to his wife, children and other grandchildren for the benefit of the children of Martha Scott. The words, "in addition to," we think were intended by the testator, and must be construed, as making the legacies given by the codicil subject to the condition upon which the legacy given by the will was to become payable.

The judgment of the County Court and the order of the Probate Court are reversed, and the cause is certified back to the Probate Court.

JOHN HALNON v. WILLIAM HALNON.

Award Under Seal.

1. An award under seal is a specialty within the meaning of the Statute of Limitations; and this is so though the submission was by parol.
2. R. L. ss. 956, 959, Statute of Limitations, construed.

DEBT on an award. Pleas, general issue and Statute of Limitations. Demurrer to the plea of said statute. Heard, June Term, 1882, TAFT, J., presiding. Demurrer overruled.

Stewart & Wilds, for the plaintiff.

The award was a specialty within the meaning of R. L. s. 956. Angell Lim. p. 90; *Smith v. Lockwood*, 7 Wend. 241; *Hodgen v. Harrindge*, 2 Saund. 187; *Pease v. Howard*, 14 Johns. 480; Freeman Judg. 32; *Smith v. Johnson*, 15 East, 213; 12 N. Y. 9.

Hard & Safford, for the defendant.

As is well known, a specialty is a writing, sealed and delivered, containing some agreement. And it is equally familiar law that to authorize an agent to execute a specialty his authority must be conferred by an instrument under seal. It not being alleged in the declaration that the submission was a sealed one, it is plain that the award is not a *specialty* within the true and legal sense of that term.

The opinion of the court was delivered by

ROYCE, Ch. J. This was an action of debt on an award under seal. The award was made on the 13th of March, 1874; and the amount awarded to be paid the plaintiff was, by said award,

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ordered to be paid within four months from its date. The writ in this case was dated the 25th day of May, 1881, more than six, and less than eight, years after the time had elapsed within which the sum awarded was ordered to be paid. The defendant pleaded the general issue and Statute of Limitations; and the case was heard upon the plaintiff's demurrer to the plea of the Statute of Limitations. Section 959, R. L., provides that actions of debt founded upon a contract, obligation or liability, not under seal, shall be commenced within six years after the cause of action accrues, and not after; and s. 956, that actions of debt on specialties shall be commenced within eight years after the cause of action accrues, and not after. The question presented is, which of the periods of limitations named in said sections is applicable? If the award declared on is to be treated as a debt founded upon a contract, obligation or liability, not under seal, it was barred under s. 959; if it is to be regarded as a specialty, suit to enforce it might be brought under s. 956 within eight years after the cause of action accrued, and it is not barred.

An award is the judgment of the arbitrator upon the matters submitted. It is competent for the parties to the submission to stipulate how the award shall be made, whether it shall be a parol award or be sealed; and the submission may be by parol or by an instrument under seal. It is the duty of the arbitrator to follow the submission, and if that requires that the award to be made should be sealed, it should be so executed. It is alleged in the declaration that in making the submission it was agreed that the award to be made should be in writing and under the hand and seal of the arbitrator, so that the arbitrator was acting within the submission in so making his award.

Was the award thus made a specialty? It is claimed that to give validity to the award as a specialty, it was necessary that the authority to so make it should have been conferred by an instrument under seal. We do not think that was necessary. The defendant cannot question the authority of the arbitrator while he was acting in conformity to the submission. The authority could be conferred as well by parol as by a specialty. A specialty has always been defined and understood to be a writing under the

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hand and seal of a party ; the award declared upon comes within that definition.

The court erred in overruling the demurrer, and the demurrer is sustained, plea adjudged insufficient and cause remanded.

TOWN OF GRANVILLE v. TOWN OF HANCOCK.

Pauper.

1. An authorized person cannot serve an order of removal of a pauper.
2. A special designation in a statute of the officers who may serve the process excludes all others.
3. R. L. s. 2835, pauper, order of removal, how served,—construed.
4. Word “may” in statute construed.

APPEAL from an order of removal of a pauper. Motion to quash. Motion overruled, June Term, 1882, TAFT, J., presiding. The case is stated in the opinion.

J. M. Slade, for the plaintiff.

William H. Bliss, for the defendant.

The opinion of the court was delivered by

POWERS, J. This is a motion to quash an order of removal of a pauper, made by two justices, from the town of Granville to the town of Hancock.

The notice appended to said order was directed “to any sheriff or constable in the state or to H. H. Whitney authorized person” ; and the same was served by said Whitney as an authorized person. The statute, R. L. s. 2835, declares that “the copy of the order of removal, with the notice, shall be served on the overseer

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of the poor of the town to which the pauper is ordered to be removed, as writs of summons are served ; and may be served by a sheriff of the county in which either town is situated or by the constable of either town."

It is insisted by the appellant that the language of this section excludes a service by an authorized person ; and we think this point is well taken. When the legislature makes a change in matters of procedure, its purpose is ordinarily discovered by looking at the method supplanted by the new legislation and the mischief sought to be corrected. Under the old law these proceedings were served upon the defendant town by any person whom the justices might designate ; and the fact of service was established by proof. This mode of service led to much confusion and gave rise to much contention respecting the fact whether service had been made at all. Accordingly it at length resulted in the enactment of the statute quoted above, in which the officers who may serve the process are specifically designated. This special designation of the officers who may serve the process excludes all others.

If the word " may " is to be construed in a permissive sense, it is meaningless. Without this word the sheriff or constable could serve the process. If the clause had stood that the process might be served as writs of summons are served, any one who could serve such writs would be competent to serve this process. But the section goes further and implicitly excludes all persons save those specially named ; accordingly there was no power in Whitney to serve the process, and hence no legal service was made.

The judgment is reversed and judgment rendered that the order be quashed.

PATTY S. FLETCHER v. IRA D. FLETCHER.

Gift. Delivery. Acceptance.

1. The plaintiff and her brother lived with their father on his farm. The brother, on account of the infirmities of the father, had the whole management of the farm, and provided for the common table of the entire household. The covered carriage in question was kept, when not in use, in an outhouse on the farm built by the brother at his own expense. The father called the members of the family into the dining room of the house, and in the presence of all gave the carriage to the plaintiff, he requesting all to witness the gift. The defendant took the carriage off, and claimed that the father afterwards gave it to him. *Held*, that the defendant was not entitled to have the court charge that the gift was invalid for want of a sufficient delivery; that, if there was, under the facts of this case, a declaration of the gift in plain terms, and a surrender and acceptance of dominion, it was sufficient.
2. The charge should not have been limited to the element of delivery, but should also have submitted the question of acceptance.

TRESPASS. Plea, general issue. Trial by jury, December Term, 1882, POWERS, J., presiding. Verdict for plaintiff. The plaintiff claimed title to the covered carriage by virtue of an oral gift from her father, and that the gift was made on the 8d day of August, 1876. The defendant claimed that her father subsequently gave and delivered the carriage to him. The plaintiff and her brother Joseph lived with, and constituted a part of, the family of their father, James Fletcher. They lived on the father's farm; but, owing to his infirmities, Joseph for five years both prior and subsequent to the alleged gift had the entire management of the farm, and provided for the common table of the entire household. The carriage, when not in use, was kept in an outhouse on the farm, built in 1874 by Joseph at his own expense, for that and other purposes; and it was used as occasion required by all the members of the family.

It appeared by oral testimony that the father in some way had transferred to Joseph the remainder in the farm. The testimony on the part of the plaintiff tended to show, that on the morning

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of August 3d, 1876, while the family were at the breakfast table, but after Joseph and the help had left the room, James desired them to be recalled; that they were recalled, and returned into the dining room, where, in the presence of the assembled family, consisting of the father and mother, Patty, Joseph and his wife, Aurelia, another daughter, Reynolds, the hired man, and the hired girl, he declared that he gave the carriage to the plaintiff, upon condition that she would wash and keep it clean, and never lend it, and called the assemblage to witness that the carriage was then Patty's.

At this time said carriage was locked up in said outhouse, and no one went nearer to it than the dining room in which the alleged gift to the plaintiff was made. Some time during the day on which the alleged gift was made, the plaintiff and her brother, Joseph, and his wife, as they had been accustomed to do during the two years preceding, washed said carriage, it having been soiled with mud by use the day before.

After the said pretended gift, the carriage was kept in the same outhouse, and was used by the members of the family as it had been previously used, except that they no longer asked permission of James to use it as was formerly their universal habit.

The plaintiff's evidence also tended to show the father's declarations to third parties after the talk in the dining room, to the effect that he had given the carriage to said Patty; that Patty washed the carriage whenever it needed it, and used it frequently, sometimes every day.

The plaintiff was a sister of the defendant. His testimony tended to show that the father gave the carriage to him sometime in October, 1878; that he procured the key, went to the outhouse, unlocked the door and delivered the carriage to him, and that he took it off; that it was an unconditional gift, except his father could use it when he wished to during his lifetime.

Hard & Safford, for the defendant.

Here was no delivery. A gift is not valid without an actual delivery. The possession must be transferred, in point of fact. *Irons v. Smallpiece*, 2 B. & Ald. 551; *Reed v. Spaulding*, 42 N.

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H. 114, 119; *Tyler v. Fire Dept.*, 1 Edw. Ch. 294, 296; *Carpenter v. Dodge*, 20 Vt. 595, 600; 3 Wait Ac. & Def. 488. The delivery must be actual, so far as the subject is capable of delivery; and it must be the true and effectual way of obtaining the command and dominion of the property. If the thing is not capable of actual delivery, there must be some act equivalent to it. *Sanborn v. Goodhue*, 8 Fost. 48, 56; 3 Wait Ac. & Def. 489. There must be a parting with the possession and all control over the property by the donor, and a vesting of the possession in the donee. *Minchin v. Merrill*, 2 Edw. Ch. 333, 337. No gift *inter vivos* will confer title unless there be a positive change of possession. 3 Wait Ac. & Def. 489. A mere verbal gift of a chattel to a person in whose possession it is, does not pass any property to the donee. *Shower v. Pilck*, 4 Exchq. 478; 1 Chit. Cont. 60.

In case of an alleged gift from a father to a member of his family the presumption is strongly in favor of his continued possession. *Kellogg v. Adams*, 51 Wis. 138. There must have been an acceptance of the carriage by the plaintiff in order to vest any title to it in her. 3 Wait Ac. & Def. 488; *Blaisdell v. Locke*, 52 N. H. 238, 243.

Stewart & Wilds, for the plaintiff.

Delivery may be constructive. 1 Parsons Con. 201; 1 Bouvier, L. D. 633. There was in law a delivery of the carriage. 2 Kont Com. 439; 11 Reporter, 416; 11 U. S. Dig. 399, s. 12; 6 U. S. Dig. 778; Schouler Pers. Prop. 85; *Allen v. Cowen*, 23 N. Y. 502; *Martrick v. Linfield*, 21 Pick. 325; *Kellogg v. Adams*, 51 Wis. 138; *Pierson v. Heisey*, 19 Iowa, 114; *Karigan v. Rantigan*, 43 Conn. 17; 43 Mich. 272. The acts of the donee show an acceptance.

The opinion of the court was delivered by

VEAZEY, J. The testimony of the plaintiff tended to show a completed gift of the carriage in question. Under the facts stated there was no necessity of a visible presence or laying on of hands to constitute a delivery. In case of a carriage situated as this was, if there is a declaration of the gift in plain terms, and a sur-

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render and acceptance of dominion, it is sufficient. *Ross & Wife v. Draper*,* Franklin County, January Term, 1883; 1 Parsons Con. p. 201; 1 Bouvier, L. D. 633; 2 Kent's Com. 439; *Martrick v. Linfield*, 21 Pick. 325; *Kellogg v. Adams*, 51 Wis. 138; s. c. 37 Am. Rep.; *Harris v. Hopkins*, 43 Mich. 272; s. c. 38 Am. Rep. 180.

Therefore the defendant was not entitled to have his request to charge granted, which was to instruct the jury that upon the facts the alleged gift was invalid and ineffectual to vest any title in the plaintiff for want of sufficient *delivery* and *acceptance*. Her testimony tended to show both elements of a complete gift, viz., delivery and acceptance; and was sufficient to deprive the defendant of the right to have a verdict directed for him, but was not of that conclusive character that would have warranted the court to direct a verdict for the plaintiff. As the charge is reported in the bill of exceptions, it seems to us to have been limited to the element of delivery, without submitting the question of acceptance. Under this construction there was error. If the subject of the gift is certain, there must still be the mutual consent and concurrent will of both parties. Kent's Com. vol. 2, 438. It does not appear that the plaintiff expressly signified her acceptance of the gift when alleged to have been made; but her subsequent acts tended to show an acceptance before any revocation by the donor. The question of acceptance as well as delivery was, therefore, an open one to be passed upon by the jury.

Judgment reversed and new trial granted.

* *Ross and Wife v. Draper*, *post*.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTY OF WINDSOR,
AT THE
FEBRUARY TERM, 1883.

PRESENT :

| | | |
|--|---|-------------------|
| HON. JONATHAN ROSS, HON. H. HENRY POWERS, HON. WHEELOCK G. VEAZEY, HON. JOHN W. ROWELL, | } | ASSISTANT JUDGES. |
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MILTON GERRISH v. WM. L. BRAGG AND CHARLES HUTCHINSON.

[IN CHANCERY.]

Patent Right Note. Estoppel. Consideration. Subrogation.
Ignorance of Law, Knowing all the Facts. Mortgage
Discharged, When not Reinstated. Put
Upon Inquiry.

1. No one is barred, or estopped, by a judgment, except the parties, or their privies; thus, the orator owning two notes secured by mortgage, given in exchange for one note, the consideration of which was a patent right, sold one and a proportional part of the mortgage to S. S. sought to foreclose the mortgage without making the orator a party, and was defeated. The orator was not *estopped* by the decree.

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2. The presumption is that a note given for a patent right has a legal consideration, where there is no evidence either that the patent was valuable or that it was worthless. The purchaser of such a note before due is not put upon inquiry.
3. The question, whether a defendant in a foreclosure suit may be subrogated to the rights of a prior mortgagee, may be raised by *answer*. He is not compelled to resort to a *cross-bill*.
4. Doctrine of subrogation and its application stated: cannot be invoked when inequitable to do so; or, if unreasonable delay; or, if the rights of others have intervened; or, where no misapprehension of facts; thus, a prior mortgagee, *knowing all the facts*, but supposing that a certain decree in chancery was decisive that the orator's mortgage was void, because the note which it secured was given for a patent right, and said decree had established the invalidity of another note given to the orator at the same time and really for the same patent,—discharged his old mortgage, and took a new one subsequent to the orators; the defendant, having had two opportunities in court to ask to be subrogated to the rights of the prior mortgagee, but neglected to do so; the defendant in fact, having paid the mortgage debt, *not to protect his interest in the mortgaged premises, but his interest in certain personal property on the premises*, having, in some arrangement about it which had been attached, obligated himself to pay the debt, and then took his mortgage. *Held*, that the old mortgage could not be reinstated; that the defendant was not entitled to be subrogated* to the rights of the first mortgagee.

PETITION in common form to foreclose a mortgage. Heard on petition, answer, replication, and the report of a special master, May Term, 1881. TAFT, Chancellor, decreed a foreclosure. September 8th, 1851, Elisha G. Culver purchased of John Porter a farm in Hartford, and executed a mortgage thereon to secure the purchase price, \$2931.86. In May, 1871, C. T. Smith and F. A. Hatch sold to said Culver a patent right for \$2400, for which he gave his note to said Hatch. The patent, called Rhodes & Hamlin's Centrifugal Power, was represented as valuable. Culver had an opportunity to inspect one of the machines before purchasing, and did so. Soon after the sale a sample machine was sent him, but it was not like the one first shown him, and was worthless. The master found:

"No evidence was produced before me showing that the patent or a machine constructed according to the specifications of the patent, was valuable or worthless, and I do not find on this point either way; and the orator's counsel said nothing about it. Immediately after the sale to Culver said Hatch applied to the orator, at his home in Franklin, N. H., to buy the Culver note; and the orator agreed to buy it at a discount, if

* See *National Bank v. Cushing*, 53 Vt. 325; *Ferre v. American Board*, 53 Vt. 175; *Scott v. Pachin*, 54 Vt. 265; *Evarts v. Hyde*, 51 Vt. 194; *Wilson v. Burton*, 52 Vt. 394; *Stevens v. Goodenough*, 26 Vt. 676.—RKP.

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well secured; and the orator immediately applied to Daniel Barnard, an attorney of Franklin, to assist him in raising the money to pay for the Culver note; for Mr. Barnard agreed to help him if the paper was good and well secured, so that the money could be raised on it at the bank. Barnard was to have a share of this discount obtained to pay for assisting the orator in the matter.

"The orator told Barnard at this time that E. B. S. Sanborn, Barnard's law partner, was to go and see about the security; and Barnard wrote a note to said Sanborn cautioning him to see to it that the paper was all right. Smith thereupon sent word to Culver to meet him at Hartford, Vt.; and on the 31st day of May, 1870, Culver went to S. M. Pingree's office in Hartford, Vt., and there met Hatch and Smith and S. M. Pingree, and at request of Hatch took up the \$2400 note he had given and gave to Hatch in place of it another note for \$2400, payable in one year from date to Milton Gerrish (the orator) or order, and also gave a mortgage on his said farm to secure the same. This new note and mortgage were given at request of Hatch and Smith, to enable them to raise money on the note, as they said. It was finally agreed that the papers should be left with S. M. Pingree, who was acting as attorney for Hatch and Smith, and that Culver should meet Hatch and Pingree and an attorney to be sent by the orator, at Woodstock, and finish the matter there.

"There was no evidence produced that showed that the orator ever authorized Hatch and Smith to take this \$2400 note and mortgage payable to him, or that he knew that they had so done or that he ever accepted the same.

"June 3d, 1870, as agreed, Culver went to Woodstock and there met Hatch, S. M. Pingree, E. B. S. Sanborn, and talked the matter over with them and finally gave them in place of the \$2400 note, \$500 in cash and two notes dated June 3d, 1870, one for \$1000 payable six months from date (which is the note in question in this suit), and one for \$900, payable three months from date. Both notes were written payable to F. A. Hatch or order. At the same time he gave a mortgage to Hatch on his said farm to secure the two notes, which is the mortgage to foreclose which this suit is brought. This change in amount of notes and time of payment was made at request of Culver, as was also the payment of the \$500, he preferring to pay the \$500 to having his wife sign the mortgage. The \$500 paid by Culver was received by Hatch. The only consideration Culver received for the \$500 in cash and the \$1900 in notes was the patent right called Rhodes & Hamlin's Centrifugal Power.

"E. B. S. Sanborn came to Woodstock to see if the security which Culver should give was ample, and if it was, to close the trade with Hatch for Gerrish. He acted in what he did in the interest of Gerrish, and as his attorney, though his services and expenses were paid by Hatch, that being part of the bargain between the orator and Hatch. The orator is a farmer in a small way, a wool buyer and speculator, and buys and sells some notes. The orator knew before he purchased the notes that they were given for a patent right, but it did not appear that he knew what patent or its value. Sanborn knew the notes were to be given for a patent right, before they were given by Culver, but it did not appear that he knew what patent or its value.

"As soon as Sanborn satisfied himself that the security offered by Culver was ample, he telegraphed to Franklin, to Barnard or Gerrish, and the money for the purchase of the notes was sent to him by the ora-

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tor through Daniel Barnard. Immediately upon the execution and delivery of the two notes and mortgage to Hatch, he endorsed the notes in blank and assigned the mortgage by endorsement on back thereof to the orator. The notes and mortgage were delivered to Sanborn, and the mortgage was left with S. M. Pingree to be recorded. The giving of the notes and mortgage to Hatch and their endorsement and assignment by him to the orator were all one transaction. The orator paid Hatch for the two notes \$1725, being a discount of \$175 on \$1900.

"As soon as the business was done Sanborn returned to Franklin, reaching home on the evening of June 3d, and that evening or the next day gave to the orator the notes, and, acting as agent for the orator, sold the \$900 note to his brother, George Sanborn, for \$875. Daniel Barnard shared with the orator in the discount on the notes, and on that account endorsed the notes with the orator. The orator in a short time procured the \$1000 to be discounted by the Tilton National Bank. August 29, 1871, the orator assigned the mortgage to George Sanborn so far as it covered the \$900 note, by an assignment written on the back thereof. Said assignment was never recorded.

"Between August 7, 1870, and May 1, 1871, Culver wrote several times to the orator asking for time on the \$1000 note, and promising to pay as soon as he could. He also sent one E. R. Jennings to Franklin to see the orator and ask for time to pay. Culver also went to Franklin, saw Mr. Gerrish, and asked for time. Culver failed to pay the \$900 note when due, and George Sanborn brought a suit against him to foreclose the mortgage so far as concerned that note, to the December term, 1870, of the Windsor County Court of Chancery. Culver appeared and made answer, therein alleging that he received no consideration for the note, and setting up the facts substantially as above set forth, and alleging fraud on the part of the orator therein and his assignees. The answer was traversed, and testimony taken by both parties, and at the December Term, 1871, the court *pro forma* and without hearing dismissed the bill, and the orator appealed, and the case was heard in the Supreme Court at its February Term, 1872, held at Woodstock, and the Supreme Court, on hearing, affirmed the decree of the chancellor and remanded the cause to the Court of Chancery with a mandate dismissing the bill, and at the May term, 1872, of Windsor County Court of Chancery a decree was made according to the mandate of the Supreme Court. The orator in this suit was not a party to that suit.

"January 24, 1873, John Porter had a settlement with Culver of all the deal between them, including the amount due on the mortgage on the Culver farm, given him by Culver in 1851, and took a note from Culver for \$5596.14, that being the amount of said John Porter's claim, against Culver to that date, and also took from Culver a mortgage of his farm to secure said note. Both the note and mortgage were made running to C. W. Porter, so that said John Porter could take acknowledgment of the mortgage and finish up the business, said John Porter being a justice of the peace, and Culver being hard to settle with. This mortgage covered all the land sold by said John Porter to Culver in 1851, except twenty-five acres bought back by said Porter. This \$5596.14 was made up of what was due on the original mortgage to said Porter, and also other deal between said Porter and Culver. Culver's account against Porter was settled by endorsing it on the note. How much of the old mortgage debt was included in the \$5596.14 note did not appear. At the time this mortgage was taken to C. W. Porter said John Porter

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cancelled his old mortgage and gave up the notes to said Culver. Said John Porter at the time of this transaction with Culver knew of the mortgage to Hatch, and had heard of the suit brought against Culver thereon by George Sanborn, and knew that the \$1000 note was still outstanding, but he supposed the decision on the \$900 note suit settled the question finally as to the validity of that mortgage, and that it was in reality void, and he supposed that this mortgage given by Culver to C. W. Porter was the only mortgage on the farm after the 1851 mortgage was cancelled. But at the time of the settlement between said John Porter and Culver and the taking of the mortgage to C. W. Porter, I find that neither said John Porter or Culver had any intent or thought of keeping the first mortgage alive by the mortgage to C. W. Porter, or spoke or thought about it at all one way or the other.

"In the fall or summer of 1874, Culver leased his farm to the defendant Bragg, and sold to Bragg all his personal property and put Bragg into possession; Culver leaving said farm with his family and moving on to a place a short distance therefrom. A few days after this transaction said Porter found Culver at work on the farm, and at once attached the personal property thereon which had been sold to Bragg, on a writ in favor of C. W. Porter, against Culver, on the \$5596.14 note. Then Culver and John Porter called upon Bragg and prevailed upon him to give C. W. Porter an obligation that he would pay the \$5596.14 note if Culver did not, and the suit against Culver was discontinued and the attachment withdrawn. Culver at this time paid Porter \$200 to apply on said \$5596.14 note, and gave Bragg a mortgage of said farm to secure him for giving the obligation to C. W. Porter. Soon after this Culver left Vermont and removed to Illinois, where he has since resided.

"The \$5596.14 note not being paid, C. W. Porter brought suit against the defendant Bragg, to the September term, 1878, obtained a judgment against said Bragg, which said Bragg paid. The mortgage given by Culver to C. W. Porter was discharged after Bragg paid the judgment obtained against him by C. W. Porter. Bragg thereupon brought a suit to foreclose the mortgage given him by Culver, and obtained a decree which became absolute as against Culver. The orator was not made a party to said foreclosure suit by Bragg against Culver.

"In 1875, the \$1000 note remaining unpaid, the orator procured a suit to be brought by the Tilton National Bank against the defendant Bragg, C. W. Porter and Culver, in the U. S. Circuit Court for the District of Vermont, to foreclose the mortgage given to Hatch and assigned by him to the orator so far as concerned the \$1000 note. This suit was entered in court September 7, 1875. The defendants appeared and made answer. The answers were traversed and testimony taken. The defense set up was substantially the same as in the suit of George Sanborn and Culver, and the decree in that suit was also set up as a defence. After the suit was entered in court the Tilton National Bank obliged the orator to give to it his own note for \$1605.50, dated December 25, 1876, being the amount of the Culver note and interest to that date, and let the Culver note lay in the bank as collateral. On hearing in said Circuit Court a decree was made in favor of said bank for \$128.92, that being the amount of the Culver note then due to the bank, the balance of said Culver note having been paid to the bank by the orator, as aforesaid. The court held that as the bank received the note while current, and without notice, they could recover the amount actually due on it to the bank. The orator was not a party to that suit.

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"John Porter was called as a witness by the defendants and on direct examination was asked the following question: 'What was your understanding and intention at time you discharged your old mortgage and took the new mortgage to your son Charles as bearing upon the security which you had on that real estate?'"

"Objection was seasonably made by the orator, and the answer was received, subject to objection, as follows: 'I had understood there was a mortgage given by Culver for about \$1900, and that one of those notes had been sued and decision had been given against the validity of the note and transaction, and Mr. Culver and I were talking up the matter. We arrived at the conclusion that the decision on the other note would be the same, and a new mortgage would be a first lien on the property.'

"Said Porter was also asked on direct examination the following question: 'If you had supposed that the discharge of the old mortgage and taking of the new mortgage would have made the new mortgage subject to the \$1900 mortgage, would you have discharged the old mortgage and taken the new one?' Ans. 'I did not suppose that the patent right mortgage, as it was called, would ever amount to anything, or would interfere with my mortgage, or I certainly shouldn't have taken a new mortgage if I had supposed I was coming in with second security by doing so.'"

Norman Paul, for the defendant.

The \$900 and \$1000 notes being given for the same consideration, at the same time and to the same person, they are but parts of one and the same transaction. The hearing and determination of the whole subject-matter on its merits in the Sanborn suit is conclusive on the question of the validity of said notes and mortgage, and that question cannot be again raised in this suit. *Bigelow Estop.*; *Story Eq. Pl.* s. 790; 7 *Bac. Abr.* p. 619; *Gray v. Pingry*, 17 *Vt.* 419; *Cabot v. Washington*, 41 *Vt.* 168; *Chase v. School District*, 47 *Vt.* 524; *Ehle v. Bingham*, 7 *Barb.* 494; *Adams v. Barnes*, 17 *Mass.* 365; *Outram v. Merwood*, 3 *East*, 346; *R. R. Co. v. R. R. Co.* 20 *Wall.* 137. There was no consideration for the notes. *Cragin v. Corbin*, 34 *Vt.* 326; *Clough v. Patrick*, 37 *Vt.* 421. On the facts found, the John Porter mortgage should be reinstated. 2 *Jones Mortg.* s. 971; *Sheldon Subrogation*, ss. 13, 20; *Mower v. Granger*, 9 *Vt.* 242; *Proctor v. Thrall*, 22 *Vt.* 262; *McKenzie v. McKenzie*, 52 *Vt.* 271; *Shaw v. Williams*, 87 *Ill.* 469. The Porter mortgage being a prior lien, and the defendant Bragg having paid it to protect his own estate, is subrogated to all the rights of the first mortgagee. 1 *Jones Mort.* ss. 876, 885; *Walker v. King*, 44 *Vt.* 601; s. c. 45 *Vt.* 525; *Barnes v. Mott*, 64 *N. Y.* 397; *Young v. Morgan*, 89 *Ill.* 199.

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J. F. Colby and *Samuel E. Pingree*, for the orator.

The defendants are not entitled to be subrogated to the rights of Porter. *Sheldon Subrogation*, ss. 241-2; *Simonds v. Brown*, 18 Vt. 231. The Porter mortgage cannot be reinstated. *Guy v. DuUprey*, 16 Cal. 195; *Dingman v. Randall*, 13 Cal. 512; *Banta v. Garns*, 1 Sand. 388; *Frazer v. Juslee*, 1 Green (N. J. Eq.), 239; 29 Md. 178. Where a mortgage has been discharged and its satisfaction acknowledged, and a new security taken upon the same land for the same debt, the lien of the old mortgage is gone once for all, and the new security must be postponed to such incumbrances as are prior to itself, though junior to the old mortgage. 1 Jones Mort. ss. 874, 882; 11 Gray, 190; *Childs v. Stoddard*, 130 Mass. 110; *Kichell v. Mudgett*, 37 Mich. 82; *Iowa County v. Foster*, 49 Iowa, 676; *Hinchman v. Emans*, 1 N. J. Eq. 100.

The opinion of the court was delivered by

Ross, J. I. The decree in the Sanborn suit is not a bar nor an estoppel to the prosecution of this suit by the orator. The orator was not a party to that suit, nor does he stand upon the right of any one who was a party to that suit, and is not bound by its result, although the note then disallowed was secured by the same mortgage now sought to be foreclosed, and Sanborn took his title thereto from the orator. If the orator had been made a party to that suit, he might have produced other and different proof from that adduced by Sanborn, and so have secured a different decree. The U. S. Circuit Court held that the decree in that suit was no bar to the foreclosure of the mortgage on the note in contention, when prosecuted at the expense of the orator against Culver, C. W. Porter and defendant Bragg in the name of the Tilton Bank, which held the note as collateral security for the orator's indebtedness to the bank. There is quite as much ground for holding that the decree in the latter suit bars or estops the defendants, who were all defendants in that suit, or stand on the right of those who were defendants therein, as that the decree in the Sanborn suit bars or estops the orator from the prosecution of this suit. The findings of the master in this suit demonstrate

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the justice of the well-established rule, that no one is barred or estopped by a judgment, except those who are parties or privies thereto, and so have had, either by themselves or by those into whose rights they have succeeded, an opportunity to produce testimony, and be heard in the adjudication. It is manifest that either the orator has been able to produce different testimony before the master from that produced before this court in the Sanborn suit, or he has been able to induce the master to consider and weigh the evidence produced in a different light and manner from that in which this court considered it. On the facts found by the master, we think the orator is entitled to a decree of foreclosure of the mortgage for the amount due on the note. The note *prima facie* evidences a consideration therefor. No want of consideration is found by the master. The orator and his agent in the negotiation for the purchase of the note knew the same was given for the purchase of a patent right, but knew not what patent right, nor its character or value. He paid value for the note. The discount was not large, in the condition in which the money market was at the time of the purchase. It is not found that the note was without consideration, nor that it was possessed of any infirmity in the hands of the original payee. The law which secures to inventors the exclusive right to make and vend patented articles recognizes such secured rights as property and valuable. Some such rights are very valuable; others are valueless. Granting that the latter class is much the more numerous, no legal presumption arises that the patent right for which this mortgage note was given was therefore without value. It was the first step in the defence to show that the patent right for which it was given was without value; and for that reason the note was without consideration and void in the hands of the original payee. Without this fact established, there is no ground for inquiring whether the orator took the note under such circumstances that he was put upon inquiry in regard to an infirmity which would avoid the note in the hands of the original payee at its inception. There was no infirmity established of which the orator could learn by inquiry, and therefore he was not bound, under any circumstances, to make inquiry.

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II. But the defendant Bragg contends, that if the orator is entitled to a foreclosure of the mortgage against Culver, and those who stand upon rights in the mortgage premises acquired through Culver subsequently to the giving of the mortgage, he has no right to foreclose the same against him, inasmuch as he is entitled by subrogation to stand upon the mortgage given by Culver to John Porter in 1851, which was long before the giving of the mortgage in contention. If this be so, and the defendant Bragg is shown to have such relation to the Porter mortgage that he is entitled to assert it in his favor, we think he may make this defence by way of answer, and is not compelled to resort to a cross bill. It is only necessary for the defendant Bragg to establish that in equity he has a better and prior right to the mortgage premises than the orator to defeat the orator's foreclosure thereof as to him. If he shows himself entitled to the rights which John Porter had under the mortgage of 1851, before the same was discharged upon the record, he can avail himself of this defence in an answer the same as Mr. Porter could have done. He defeats the orator's right to a foreclosure of his mortgage against him when he shows that he stands upon an earlier mortgage which he has the right to assert as against the orator's mortgage. The orator can thereafter move no further as against him in his foreclosure until he has redeemed the defendant's prior mortgage. The doctrine of subrogation is purely an equitable doctrine. It is generally asserted in favor of a surety, or one who to protect his own interest in property has been compelled to pay the debt of another, by putting such person in the place of the original payee of such debt in regard to security upon the property affected. A party is never allowed to invoke it in his aid where it would be inequitable for him to do so. When a party would invoke it to raise a right which he or his predecessor in that right has discharged, he must show that the discharge was through a misapprehension of the facts inducing it; that no rights have intervened to be injuriously affected; that he has been guilty of no delay in its assertion; and that he is so related to that right and the subject-matter thereof that he is entitled to succeed thereto.

These, in general terms, are some of the things he must establish. On consideration of the facts found by the master on this branch of the case, we do not think they place the defendant Bragg in such relation to the John Porter mortgage of 1851 that he is entitled to have that mortgage revived as against the orator. The facts found by the master, in brief, are as follows: The mortgage which the orator is seeking to enforce was given June 3, 1870. At that time there was resting upon the premises the mortgage from Culver to John Porter given in 1851. January, 1873, John Porter and Culver settled all their deal to that date. Porter gave up the old notes and discharged upon the record the mortgage of 1851. He took Culver's note for \$5,596.14, secured by a new mortgage of the same premises running to Charles W. Porter. Neither Porter nor Culver had any intention of keeping the old mortgage on foot, though they then knew of the orator's mortgage, and that the note in suit was outstanding. They had heard of the result of the Sanborn suit, and did not regard the orator's note and mortgage of any account. How much of the old mortgage debt went into the new note of \$5,596.14 the master is unable to ascertain. From the amount of the new note as compared with the old one, it is to be presumed that some indebtedness not secured by the old mortgage entered into the new note, which was the balance found due on a settlement of all their deal. In the fall of 1874, Culver leased the mortgaged premises to the defendant Bragg and sold him his personal property. John Porter, who was still the real owner of the new note taken to his son C. W. Porter, caused the personal property to be attached on a writ issued to enforce collection of the new note. He then induced Bragg to become obligated to pay the new note if Culver did not, and released the attachment. Bragg received back the personal property attached, and took a mortgage of the premises from Culver to secure him for assuming the obligation. Culver not having paid the note, C. W. Porter enforced collection thereof against Bragg, and discharged the mortgage given in 1873. Bragg then foreclosed his mortgage against Culver, but did not make the orator a party defendant thereto. In 1875 the Tilton Bank foreclosure suit on the note and mortgage in contention was brought in

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the U. S. Circuit Court against Culver, C. W. Porter and defendant Bragg, and resulted in a decree in its favor against them to the extent of the orator's indebtedness to it, for which the note in suit was pledged. Neither C. W. Porter nor Bragg asked to be subrogated to the rights of John Porter under the mortgage of 1851 in that suit. It is to be observed that when Porter attached the personal property which Bragg had purchased of Culver, Bragg had no interest in the mortgaged premises which was imperiled by that attachment. He was under no obligation or compulsion, to protect his interest in the mortgaged premises, to assume the payment of Culver's debt to Porter. Porter claimed that he had not effected a sufficient change of possession of the personal property to protect it from attachment on Culver's debt. It was no fault of the orator's that he had not. If the attachment had prevailed, the debt to Porter would have been reduced by the application of what in law was Culver's property. Rather than risk this result Bragg assumed the payment of Culver's debt and took security therefor on the mortgaged premises. By the record he had constructive notice of the orator's prior mortgage. If what in law was Culver's personal property had been applied to pay the mortgage debt to Porter, all right to revive the former mortgage to the extent of the value of the personal property attached would have been gone. Bragg has by receiving back the property attached, and by the foreclosure of Culver's mortgage to him, received just what he bargained for when he became obligated to pay Culver's debt to Porter. So far as he was thus compensated by Culver for paying his debt to Porter, Bragg has no more right to have the mortgage of 1851 revived against the orator than Culver himself has. When he paid that debt C. W. Porter discharged the mortgage securing the same. The debt to C. W. Porter was not wholly the continuation of the debt of 1851. John Porter had no intention of keeping the mortgage of 1851 alive to secure so much of the old debt as had been merged in the new note. The defendant Bragg by himself or C. W. Porter, to whose right he asks to be allowed to succeed, has had two opportunities to assert the right if he had it, to be subrogated to the security furnished by the mortgage of 1851, and neglected them.

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He had such opportunity when he foreclosed his mortgage, and either he or C. W. Porter had it when they were made defendants in the foreclosure suit in favor of the Tilton Bank. In the meantime defendant Bragg has had the use of the mortgage premises, and no interest has been paid on the orator's mortgage note. Culver has left the country. Under these circumstances it would be unheard of, and outside of nearly all the equitable principles that govern the application of the doctrine of subrogation, to allow this defendant, who, as the consideration for assuming the payment of Culver's note to C. W. Porter, has received both Culver's equity of redemption in the mortgage premises and the use of them for eight years as well as the personal property which was liable to be taken as Culver's property in payment or reduction of that debt, not only to revive the discharged mortgage given to C. W. Porter to secure that debt, but also to pick out and ascertain how much of the debt of 1851 went into that debt, and moreover, to revive and stand upon the discharged mortgage of 1851, and that too, when he or C. W. Porter, to whose right he claims to succeed, has had and neglected two prior opportunities to assert this right if it existed, the orator's debt meanwhile constantly becoming larger. If under such circumstances the mortgage of 1851 can be revived, and the defendant Bragg can stand upon it as a defence, when and under what circumstances is the discharge of a mortgage absolute, and beyond the reach of the doctrine of subrogation? If revived, what debt secured thereby has the defendant Bragg paid for which he has not already been repaid? What is the amount of such debt? Who can find out from any facts found by the master? On the facts found this is not a case in which the defendant Bragg can call to his aid the equitable doctrine of subrogation.

The decree of the Court of Chancery is affirmed and cause remanded.

Luce v. Hoisington.

NAPOLEON LUCE v. EDWIN HOISINGTON.

Double Plea.

A plea setting forth two full defences is double and bad on demurrer ; thus, a plea to an action of trespass for taking an ox, alleging that the ox was turned out by the plaintiff for attachment, and, also, an accord and satisfaction after the taking, is double.

TRESPASS for taking an ox. Heard on demurrer to the defendant's plea, December Term, 1882, TAFT, J., presiding. Demurrer overruled. As to turning out the ox for attachment the plea alleged :

And that afterwards, to wit, on the same 15th day of March, A. D. 1880 this defendant, as constable aforesaid, went with said writ to the place where the said plaintiff, Napoleon Luce, was then stopping in said Hartland, and where the plaintiff then had in his possession said ox in said declaration mentioned, and this defendant then and there exhibited said writ to said plaintiff, Napoleon Luce, and informed said plaintiff of the tenor and effect thereof, and thereupon the said plaintiff then and there turned out the said ox and certain other property to be taken and attached on said writ, and this defendant immediately afterwards at said Hartland, on said 15th day of March, A. D. 1880, by virtue of said writ and by the consent of the said Luce attached said ox and certain other personal property of said plaintiff upon said writ and took and retained the actual custody of said ox and said other personal property by virtue of said attachment and consent until the 10th day of May, A. D. 1880, as hereinafter set forth, at a large expense therefor to this defendant, to wit, eight dollars.

And this defendant further avers that afterwards, to wit, on the said 12th day of April, A. D. 1880, the said justice issued a writ of execution in favor of said Adams against the said Luce in due form of law. . . .

The plea then alleges the accord and satisfaction, as stated in the opinion of the court.

Norman Paul, for the plaintiff.

The defendant's plea in bar is double ; it sets forth two distinct grounds of defence, and is therefore bad. 3 Bl. Com. 311 ; 1 Chit. Pl. 226, 532 ; Gould Pl. 390 ; 7 Bac. Abr. p. 644 ; 10 Vt. 412 ; 26 Vt. 397 ; 37 Vt. 127 ; 40 Vt. 526 ; 7 Wend. 129.

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Gilbert A. Davis, for the defendant.

What is alleged about the ox having been turned out upon the writ is merely inducement to the gist of the plea which is the accord and satisfaction, and the different facts form together but one proposition. 1 Chit. Pl. (8d Am. Ed.) 227; *Torrey v. Field*, 10 Vt. 372, 411, 412.

A plea may contain as many facts as are necessary to constitute one defence, and is not on that account double. *Patcher v. Sprague*, 2 Johns. 462; *Vaughan v. Evarts*, 40 Vt. 530; *Mott v. Hazen & Sowles*, 27 Vt. 208, 214.

The opinion of the court was delivered by

Ross, J. The only defect in the defendant's plea in bar now insisted upon is that it is double, in that it sets forth two full defences to the action. If this be so, it is bad on demurrer.

The statute exempting certain personal property from attachment and levy of execution, R. L. s. 1556, provides that property shall be exempt "unless turned out to the officer to be taken on the attachment or execution by the debtor." The plea alleges that the defendant was at the date of the alleged trespass an officer, having a writ in his hands for service against the plaintiff, commanding him to attach the property of the plaintiff thereon, and that, while serving the writ on the plaintiff, the plaintiff "turned out" the ox in contention to be taken and attached on the writ, which ox he kept by virtue of the attachment so made and the consent of the plaintiff, until after recovery of judgment in the suit, in which the attachment was made, and the seasonable charging of the ox on the execution issued on such judgment when the plaintiff paid the defendant the damages and costs of that suit, whereupon the defendant delivered the ox back to the plaintiff. These facts alone, if established, furnish a full defence for the taking and detention of the ox, which the plea alleges are the same supposed trespasses mentioned in the declaration.

The plea, in addition to the above facts, also sets forth that on the occasion when the plaintiff paid the defendant the damages and costs recovered in the suit in which the ox had been attached, the plaintiff claimed that the ox was exempt from such attachment,

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and that he, the defendant, claimed that the ox had been lawfully attached and held on the writ and execution, and that he settled and adjusted the claim of the plaintiff made in that behalf, by throwing in his charges for keeping the ox, and thereupon the plaintiff received back the ox and other property attached in "full satisfaction and discharge of the said supposed trespasses, and of all damages sustained thereby." These facts, if proven, are a full defence of the trespasses complained of. We think the plea was double and obnoxious to the defect complained of by the plaintiff. The plaintiff could not safely traverse the plea without being liable to meet proof of either or both of the two full defences set forth in the plea. The plea is distinguishable from the fourth plea in *Torrey v. Field*, 10 Vt. 353. In that case it was necessary to allege the truth of the facts claimed to be libelous, in order that their publication under the order of the chancellor even might be privileged. If the defendant had obtained under an order of the chancellor the publication of libelous falsehoods, such publication would furnish him no justification. Hence, the allegation that the matter published was true, was necessary to make their publication under the order of a chancellor a justification. There were not two full defences disclosed by the plea. In this case it was not necessary for the defendant to allege that the plaintiff turned out the ox to him to be taken on the writ to have the other facts alleged furnish a full defence, nor to allege the accord and satisfaction in aid of the turning out the ox to be attached. Each defence is independent of and complete without alleging the other, and so the plea tenders two full defences to the action.

The judgment of the County Court is reversed, and judgment rendered that the plea in bar is insufficient, and cause remanded to be proceeded with in County Court.

. AMASA PROCTOR v. E. M. WILEY.*

Written Lease under Seal. Offset. Evidence.

The plaintiff rented his farm to the defendant by lease under seal, one of the conditions of which was, that the defendant was to board the plaintiff and his wife ; and if either of them were sick, he was to receive extra pay. The plaintiff's wife was injured and the defendant put to additional expense in caring for her. In action of assumpsit, offset was pleaded, and a declaration in book account filed. *Held*,

1. That the defendant, under his declaration in book account, could not recover the charges for his extra services, as they are dependent upon the conditions in a sealed instrument.
2. That he could recover certain items of his account, not connected with any of the stipulations in the lease.
3. One of the plaintiff's charges was for the use of a sugar lot. This lot was not included in the written lease of the farm. Parol evidence was admissible to prove that the plaintiff, just before the contract was executed, told the defendant, as an inducement to make the contract, that he could have the use of the sugar place with the farm.

ASSUMPSIT. The defendant filed his declaration on book account in offset ; an auditor was appointed, and the case was heard on his report by the court, December Term, 1881, TAFT, J., presiding. Judgment for the plaintiff to recover \$112.40. The auditor found :

That the plaintiff rented his farm to the defendant by a written lease under seal ; that the following was one of the stipulations of the lease : " And the said E. M. Wiley shall board the said Amasa Proctor and his wife during said year ; and if they are sick or lame, shall take care of them ; and if they are *very* sick or lame, so as to require extra help, the said Amasa shall pay for all necessary extra help, and all necessary doctor's bills ; and the said E. M. Wiley shall pay to the said A. Proctor at the end of the year \$35 " ; that sometime during the year the plaintiff's wife received severe injuries in her knee and hip ; that by reason of these the defendant was put to extra care and expense ; that the items in his account, Nos. 31, 32, 33, were made up of this extra

* Heard February Term, 1882.

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expense, paying hired girl, &c. ; that the defendant was entitled to recover on these three items \$107.14, if he could recover at all under his plea.

The following is a fair specimen of the first thirty items of the defendant's account: (1.) one horse blanket, ninety cents; (2.) two and one-half days mending fence, \$2.50; (3.) grass seed, \$2; (4.) going after yearlings, fifty cents; (5.) driving cattle to pasture, fifty cents; (6.) drawing ten loads of hay, \$5. The auditor allowed these thirty items, as charged, at \$48.01, and the first four items of the plaintiff's account (corn meal, \$5.25; clover seed, thirty cents; grass seed, twenty cents; keeping three horses, \$2,) at \$7.75, leaving due the defendant on these the sum of \$40.26.

The plaintiff claimed to recover \$15 for the use of a sugar lot not included in the lease. The charge was not allowed. The defendant, against the objection of the plaintiff, was permitted to prove by parol evidence, that, on the day the lease was executed, and before its execution, when objection was made to taking the farm because there was no sugar place on it, the plaintiff told the defendant that he had a good sugar lot on the Bartlett farm, and that defendant could have the use of it.

The auditor found:

"The said Proctor did not make any claim before me to be allowed said thirty-five dollars rent as a matter of account, and declined to present it as such; but the said Wiley having introduced the sealed contract in evidence, the said Proctor claimed that the thirty-five dollars extinguished and paid thirty-five dollars of Wiley's account, so that so much of Wiley's account could not be recovered for in this action. The said Wiley offered to have the same allowed in this accounting, but claimed that the same should be only allowed towards items thirty-one, thirty-two and thirty-three, and that unless these items were adjusted in this action the thirty-five dollars should not be allowed."

"It appeared from the testimony of both parties that the understanding between them was, that whatever balance of account the said Wiley had against said Proctor was to be applied in payment of the thirty-five dollars rent specified in the sealed contract, and if said account exceeded thirty-five dollars, the said Proctor expected to pay the said Wiley in money the balance."

Gilbert A. Davis, for the plaintiff.

The defendant cannot recover under his plea items thirty-one, thirty-two and thirty-three. *Huxley v. Carman*, 46 Vt. 462; *R. L. s. 1203*; *Bliss v. Allard*, 49 Vt. 350; *Albee v. Fairbanks*, 10 Vt. 314; *Ganaway v. Miller*, 15 Vt. 152; *Matthews v. Tower*, 39 Vt. 438. In *Gleason v. Briggs*, 28 Vt. 135, the auditor found an *express* agreement to charge *in account*. *Chamberlain v. Farr*, 23 Vt. 265; *Rob. Dig.* 113.

John F. Dean and *Walker & Goddard*, for the defendant.

Book account will lie to recover for items properly chargeable on book, though they accrued under a contract special as to the time and manner of performance, or the time and manner of payment. *Kent v. Bowker*, 38 Vt. 148; *Austin v. Wheeler*, 16 Vt. 95; *Stearns v. Haven*, 16 Vt. 87; *Eddy v. Stafford*, 18 Vt. 235; *Porter v. Monger*, 22 Vt. 191; *Waterman v. Stimpson*, 24 Vt. 508; *Newton v. Higgins*, 2 Vt. 366; *Fry v. Slyfield*, 3 Vt. 246.

The courts have gone so far as to hold that rent for the use of land may be recovered in book account, where it was understood that it was to be so charged and claimed on trial. *Farrand v. Gage*, 3 Vt. 326; *Case v. Berry*, 3 Vt. 332; *Gunnirson v. Bancroft*, 11 Vt. 490; *Gleason v. Vt. Central R. R. Co.*, 25 Vt. 40; *Chamberlain v. Farr*, 23 Vt. 265.

The opinion of the court was delivered by

ROYCE, Ch. J. There can be no question but what the first thirty items of the defendant's account and the items of the plaintiff's account that were considered and adjudicated by the auditor, were proper matters of book charge. They were not so connected with or made dependent upon any of the stipulations or conditions contained in the written lease of the parties as to require that an action should be predicated upon the lease for their adjustment. The testimony admitted by the auditor as to what was said by the plaintiff on the day that the contract was executed and before its execution in relation to use of the sugar place on the Bartlett lot was admissible. It appears that the offer was made as an inducement to the defendant to make the contract. It is found that the

plaintiff never made any charge or intended to make any for the same. There is no error apparent in the disallowance of that item of the plaintiff's account.

The more important question arises upon the claim made by the defendant for items Nos. 31, 32 and 33 in his account. These claims are for extra care of the plaintiff's wife during some portion of the time covered by the lease, and for help employed in taking such care. The obligation to pay for such care is expressed in the lease, and it is upon that obligation that the defendant bases his right of recovery. The plaintiff objected to a recovery under the defendant's plea in offset, and claimed that if any recovery could be had it must be in an action predicated upon the lease. If an action on book would lie to recover for those items, they are recoverable under the defendant's plea.

The covenants in the lease were dependent covenants; the covenant of the plaintiff to pay for the extra care was dependent upon the performance by the defendant on his part of his covenants as expressed in the lease, so that the question whether the parties have kept and performed the covenants of the lease has to be determined before it can be found that the plaintiff is under a legal obligation to pay the claims in controversy.

The action of book account has never been understood to be the appropriate action in which to settle such a controversy. If it should be so held, parties might disregard their sealed contracts in selecting their form of action, and all controversies connected with such contracts could be adjudicated in the action of book account. We are aware that the courts in this State have been gradually extending the scope of that form of action so as to embrace business transactions that were once thought not to be within it; but it has never been held that it could supersede the forms of action that have been established and sanctioned by long and universal usage for the enforcement of remedies that were provided for and secured by the sealed contracts of the parties.

The cases relied upon by the defendant in which it has been held that a recovery might be had in the action of book account where property had been sold or services rendered under a special contract, are clearly distinguishable from this. The case of *Huxley*

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v. Carman, 46 Vt. 462, is a direct authority against the right to recover for the disputed item in an action of book account, and what is said in the opinion in that case as to what might and what could not be recovered in that action is applicable here.

This view is fatal to a recovery for those items in this action and renders it unnecessary to pass upon the questions of evidence that are presented by the report. We do not think it best at this time to give a construction to the lease; that can be more appropriately done when an action is brought upon it that requires it.

The judgment is reversed, and judgment for the defendant under his plea in offset, for forty dollars and twenty-six cents, and cause remanded.

JOHN BECKLEY v. RUSSELL JARVIS.

Evidence.

1. As bearing on the question, when payment was to be made, whether before or after the wood was all delivered, it is competent to show that the vendor was financially involved at the time the contract was made.
2. The judgment of the court below will not be reversed, though irrelevant testimony was received, if harmless.

ASSUMPSIT. Heard on a referee's report, December Term, 1882, TAFT, J., presiding. Judgment for the plaintiff to recover \$101.26. The referee found:

"The parties made a verbal contract by which the plaintiff was to deliver to the defendant's mill one hundred cords of wood for fuel at \$3.25 per cord within one year, to be paid for in four equal payments, viz., when twenty-five cords should be delivered, the defendant was to pay the plaintiff therefor, &c. Twenty-seven cords and twenty-two feet of wood were delivered. The plaintiff asked the defendant to pay him for twenty-five cords, which he refused to do, claiming that the contract was that the whole should be delivered before any payment was to be made."

Beckley v. Jarvis.

One of the plaintiff's witnesses was asked, "What were Beckley's circumstances as to property at that time?" (when the contract was made). Answer: "He was involved at that time." Some irrelevant testimony was received by the referee; as, the plaintiff was asked, and answered, "Did you carry on your farm yourself that year?"

William Batchelder, for the plaintiff.

H. W. Parker and *Gilbert A. Davis*, for the defendant.

The opinion of the court was delivered by

ROWELL, J. It was competent to show that plaintiff was involved at the time the contract was made, as bearing on the question of when payment was to be made,—whether by installments, as plaintiff claimed, or not until the wood was all delivered, as defendant claimed.

The other evidence objected to was entirely irrelevant and harmless.

Let the judgment be affirmed.

WORCESTER & WOODRUFF v. E. G. LAMPSON.

Jurisdiction of County Court. Agent.

1. The amount of the plaintiffs' specification exceeded two hundred dollars, and their evidence tended to support the whole ; but the court found that they were entitled to recover less than two hundred dollars, because some of the items should have been charged to another party. This was the issue on the trial. There was no evidence of good faith in bringing the suit to the County Court, but the court found that "there was no bad faith in the matter on the part of the plaintiffs, but they were misled by the negligent manner in which their books had been kept" by their bookkeeper. *Held*, that the court had jurisdiction; and that the presumption is that they acted in good faith.
2. The rule that the knowledge of an agent is imputable to the principal has no application to this case.

ASSUMPSIT. Plea, the general issue. Trial by the court, December Term, 1882, TAFT, J., presiding. Judgment for the plaintiff. The facts are sufficiently stated in the opinion of the court, except the following: The court found that Chase, the agent or bookkeeper of the plaintiffs, knew that these items (certain ones on the plaintiffs' specification) were not chargeable to the defendant, and that he charged them to the Windsor Mfg. Co. on the account book or pass-book kept by him at the time, and put in evidence by the defendant. The plaintiffs' attorney brought the suit in good faith, but was ignorant of the facts relative to the account.

Wm. Batchelder, for the defendant.

The plaintiffs' agent, Chase, knew that all of these items but \$21.60 were not chargeable to the defendant. It is presumed that the agent communicated these facts to his principals. Notice to him was notice to them. *Story Agency*, s. 140; *Hart v. F. & M. Bank*, 33 Vt. 252; *Corless v. Smith*, 53 Vt. 535; *Abell v. Howe*, 43 Vt. 409; *Wait, A. & D.* p. 231; 19 Vt. 410.

Woodruff v. Lampson.

Gilbert A. Davis, for the plaintiffs.

The matter in demand exceeded \$200. R. L. ss. 798, 821. The criterion is the amount of the matter in demand as distinguished from the amount recovered. *Scott v. Moore*, 41 Vt. 210; *Miller v. Livingston*, 37 Vt. 467; *Powers v. Thayer*, 30 Vt. 361. The good faith of the attorney is an element in deciding upon the jurisdiction. *Stanley v. Baker*, 25 Vt. 10. Good faith is presumed. *Scott v. Moore*, *supra*; *Clark v. Crosby*, 37 Vt. 190; *Brainerd v. Austin*, 17 Vt. 650.

The opinion of the court was delivered by

VEAZEY, J. This is an action of assumpsit. The plaintiffs presented specifications of their claims; and the items they claimed to recover for amounted when the suit was brought to over \$200. The court found that a part of the items claimed belonged to another party to pay. This was the issue on the trial. The amount of the recovery was less than \$200. The plaintiffs introduced no evidence for the purpose of showing that they brought the suit in good faith in the County Court; or as expressed in the bill of exceptions: "No evidence was introduced tending to show that the plaintiffs, or either of them, supposed or believed that they had a cause of action against the defendant within the jurisdiction of the County Court at the time the suit was brought, and no evidence on this point was offered by the plaintiffs save that Woodruff testified that he had the unpaid bills in suit."

At the close of the testimony the defendant moved to dismiss the case for want of jurisdiction in the court to try the same because it did not appear that the plaintiffs had brought their suit in good faith supposing they had a claim within the jurisdiction of the court at the time the suit was brought. The court overruled the motion, to which the defendant excepted. It is not necessary for a plaintiff having brought a suit in the County Court to recover claims amounting to over \$200, and having introduced evidence which tended to support the whole, to show that he brought it in that court in good faith, supposing he had a cause of action within its jurisdiction. The presumption is that he acted in good faith, and that is sufficient until something appears to overcome it.

Adams v. Edmunds.

Joyal v. Barney, 20 Vt. 154; *Waters v. Langdon*, 16 Vt. 570; *Ladd v. Hill*, 4 Vt. 164.

In this case the court found that "there was no bad faith in the matter on the part of the plaintiffs, but they were misled by the negligent manner in which their books had been kept" by their bookkeeper, who had been out of their employment for several years since he sold the goods and made the charges, and with whom it did not appear that they had since had any communication about the matter. The rule that knowledge of an agent is imputable to the principal has no application in this case. Other rules and reasons might be invoked to support the ruling of the County Court, but it is unnecessary.

Judgment affirmed.

AUSTIN V. ADAMS v. WILLIAM H. EDMUNDS AND ANOTHER.

Lost Note. Demurrer.

The payee of a lost note which is negotiable and payable to him or bearer, cannot sustain an action at law to recover the amount. A court of equity alone can give relief.

ASSUMPSIT. Heard on demurrer to the special count in the amended declaration, December Term, 1882, TAFT, J., presiding. Demurrer overruled.

J. J. Wilson, for the defendants, cited 12 Vt. 443; 20 Vt. 455; 52 Vt. 374; 1 Aik. 304; 14 E. C. L. 90; 3 E. C. L. 64; Chitty Bills, 66, 265, n.

Lamb & Tarbell, for the plaintiff, cited 41 Vt. 24; 14 Vt. 387; 20 Vt. 455; 12 Vt. 443; 1 Swift Dig. 437; 3 Kent Com. 78; 8 Conn. 481.

Adams v. Edmunds.

The opinion of the court was delivered by

POWERS, J. The plaintiff in his special count, which is demurred to, declares upon a lost note payable to him or bearer. He alleges that he lost the note in question and that it cannot be found, but does not allege that the note is destroyed.

It is the settled law in England and in this State that no recovery can be had upon such a note at law. A court of equity alone can give relief upon an indemnity being given to the maker. A note payable to bearer imparts a legal liability of the maker to pay any holder who may present it, and if lost it may come to the hands of a *bona-fide* holder for value before maturity and thus be enforceable even though it had been paid to the true owner.

This rule of law doubtless springs from the custom of merchants which requires the surrender of the note, on payment, to the maker that he may have a voucher showing payment. Without such voucher the maker is exposed to the hazard of litigation with an unknown holder.

A different rule prevails in some of our sister States, but this court has uniformly followed the English rule, which is thoroughly discussed in *Hansard v. Robinson*, 7 B. & C. 90 ; *Wright v. Jacobs*, 1 Aik. 304 ; *Lazell v. Lazell*, 12 Vt. 443 ; *Hough v. Barton*, 20 Vt. 455. The case of *Hopkins v. Adams*, 20 Vt. 407, is not in conflict with this rule. That was a bill in chancery to obtain relief upon a lost note, *not in fact negotiated*, and the question was whether respecting *such* a note, the bill should contain an offer of indemnity, and it was held that it need not.

REDFIELD, J., delivering the opinion says that, *if properly negotiated*, the remedy is in equity and an indemnity would be required ; that no recovery could be had at law.

This case merely settles the question respecting the giving of an indemnity, and proceeds upon the theory that lost notes *payable to bearer*, or notes negotiable in form and endorsed in fact, being valid in the hands of the holder, are enforceable alone in equity, and enforceable then only on giving indemnity against the title of the unknown holder.

The judgment is reversed, the special count adjudged insufficient, and the case remanded.

Chapman v. Goodrich.

C. H. CHAPMAN v. C. W. GOODRICH.

Statute of Limitations. Agent. Assumpsit.

1. The taking out of a writ is the commencement of an action to save the Statute of Limitations ; thus, the date of the account was April 12th, 1873, of the writ, January 28th, 1879, of the service, April 21st, 1879. *Held*, that the account was not barred ; that the date of the writ is *prima facie* evidence that it issued at its date.
2. The defendant cannot leave out of his specification a part of his account,—*items which represent a legal indebtedness*,—and thereby be enabled to plead successfully the Statute of Limitations ; and this is so although the defendant did not intend to trust the plaintiff, the meat having been delivered and charged on books by his agent, but acting within his authority.
3. The plaintiff, as guardian having control of certain land, leased it to the defendant, and charged for the use of the same in his own book account against him, with the knowledge and approval of the defendant. Afterwards the plaintiff in settling his guardian account with the Probate Court charged himself with this item as cash received of the defendant. Subsequently the defendant knowing all the facts agreed to pay the plaintiff. *Held*, that the item is recoverable in assumpsit although there is no count for use and occupation.

GENERAL ASSUMPSIT. Pleas, general issue, Statute of Limitations and set-off. Heard on the report of a referee, December Term, 1882, TAFT, J., presiding. Judgment for the defendant. One item of \$1.50 allowed by the referee to the plaintiff was dated April 12th, 1873. The other facts appear in the opinion.

W. W. Stickney, for the plaintiff.

Gilbert A. Davis, for the defendant.

The opinion of the court was delivered by

VEAZEY, J. The action is general assumpsit and was referred. The parties had mutual deal and accounts. The plaintiff's specifications consist of book charges covering a period from 1852 to 1874. The defendant filed a plea in offset and presented specifications consisting of charges from 1852 to September, 1858, and

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also pleaded the Statute of Limitations. The plaintiff's account was barred except possibly one item, unless saved by a credit allowed by the referee subject to the opinion of the court upon the facts reported.

The referee reports that the writ was dated January 28, 1879, and was served April 21, 1879, but does not say anything more as to when the writ was issued. The defendant claims that under such findings the date of the service and not the date of the writ was the commencement of this action. The rule is settled that the taking out of a writ is the commencement of an action to save the Statute of Limitations, if delivered for service in season to be served and returned to the court to which it is made returnable and is so served; and the date of the writ is *prima facie* evidence that it issued at that date. *Allen v. Mann*, 1 D. Chip. 94; *Day v. Lamb*, 7 Vt. 426. No question is made but that this writ was seasonably served and returned. We think the rule applies in this case.

The transaction constituting the credit claimed by the plaintiff occurred in June and July, 1873, which was within six years next before the date of the writ. In respect to this the referee reports as follows: "In 1873 defendant ran a meat cart, and hired one Thompson to peddle and deliver meat, and furnished him with a book in which to keep accounts of meat sold and trusted. Thompson had no instructions from defendant in respect to selling or trusting plaintiff for meat, until after the meat for which I have allowed defendant had been delivered and charged by Thompson on defendant's book. Defendant then saw these charges, and found fault with Thompson for selling and trusting defendant for the meat, and requested him not to sell and trust him for more. Defendant did not intend to have Thompson give plaintiff credit for meat. But he did not make his intention known to plaintiff, nor to Thompson until the meat had been delivered and charged."

The defendant did not embrace these items in his specifications, and denies that the plaintiff is entitled to have them allowed as a credit in his behalf, and thereby save the running of the statute. We think that this question is controlled by *Davis v. Smith*, 48 Vt. 52. It was there held that the true inquiry is, whether the item

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represents a legal indebtedness that *should* go into the accounts of the parties, and not whether either party has or has not, in fact, embraced the controverted items in his account.

It had been previously held that in case of mutual dealings and accounts, the cause of action dates from the last item of credit, and has reference to the balance of the general account, and each new item of credit, or part payment, is equivalent to a new promise to account and pay the balance due, where such new item is with the mutual understanding, express or implied, that it is to enter into the mutual dealings or accounts of the parties, and be the subject of future adjustment in ascertaining the general balance due. *Abbott v. Keith*, 11 Vt. 525; *Hodge v. Manley*, 25 Vt. 210.

There were these long standing mutual dealings and accounts between these parties. Within three months before this meat transaction the plaintiff had made a charge against the defendant for legal services rendered. The defendant's agent had general authority to sell meat on credit, and there was no restriction as to the plaintiff. The sale and charge to him was within the agent's authority. The plaintiff had as much reason to rely upon it as an item of charge against him, to be the subject of future adjustment in ascertaining the general balance, and as affecting the whole account, as upon any other item in their dealings. He evidently did so rely upon it. It occurred naturally and in ordinary course. The defendant knew of it soon after the transaction, yet gave no notice to the plaintiff that it was in fact contrary to his intention and that he should not treat it as an item of charge in their mutual dealings and accounts; but it has all the time stood on the original book where it was made without a note of warning. It seems to us too late to drop it out of the account now. It looks like an afterthought. It represents a legal indebtedness, and upon the facts reported should go into the account. The defendant cannot now be allowed to say that this particular transaction in this long course of dealing shall not have the ordinary effect which was fairly to be expected from it.

One item of charge allowed the plaintiff and objected to by the defendant was five dollars for the use of certain land by the de-

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fendant belonging to a person under guardianship, and the plaintiff was the guardian. The defendant promised the plaintiff to pay him this sum. Afterwards the plaintiff rendered his guardian account to the Probate Court, and in this account charged himself with this item as cash received of the defendant. Subsequently to this the defendant, knowing the plaintiff had thus accounted, and had paid over the amount on final settlement of his trust, again agreed to pay the plaintiff said sum. After stating other facts as to the plaintiff's understanding and action in reference to this matter, the referee says: "But from the relation of the parties and their manner of dealing with each other in February, 1868, (the date of the charge,) I believe and find that the defendant then intended that plaintiff should charge this item in his book account against him, and to have it adjusted with the other items."

We think upon the facts found the item is recoverable in assumpsit, although there was no count in the declaration for use and occupation. The plaintiff rendered his guardian account and made this payment in settlement in reliance upon the defendant's promise, which promise was subsequently renewed by the defendant knowing the facts and intending the item should be charged against him and be adjusted with the other items. It was in substance an authorized payment in behalf of the defendant, which the defendant subsequently promised the plaintiff to repay to him.

The judgment of the County Court is reversed, and judgment for the plaintiff to recover of the defendant the sum of \$3.32 with interest.

JOSEPH ELLIS v. GEORGE W. CLEVELAND.

Evidence. Damages.

1. A party cannot introduce his own sayings as evidence in his own favor, as a rule; thus, in an action for false imprisonment, the question being whether the plaintiff consented to be imprisoned in another county than the one in which he was arrested, what he said to a third party, while in the custody of the officer, as to the cause of his arrest, and where he was to be taken, is not admissible.
2. In an action for false imprisonment, where the only claim against the officer was, that the plaintiff was imprisoned in another county than where he was arrested, testimony as to the miscarriage of the wife and the expense of doctoring her claimed to have been caused by her husband's arrest,—is not admissible.

TRESPASS for false imprisonment, brought against the defendant and one Perrigo, since deceased. Pleas, general issue, and justification as servant of said Perrigo, an officer, in serving legal process. Replication, *de injuria*. Trial by jury, December Term, 1882, TAFT, J., presiding. Verdict for the plaintiff. The history of the case is given in 54th Vt. 437. The plaintiff was arrested in Windsor County, and imprisoned in the jail in Orange County. The question was, whether the plaintiff consented and requested to be taken to the jail in Orange County,—the plaintiff contending that he did not, and the defendant that he did. The third question and answer in Kezer's deposition were as follows :

"Q. State whether he (Joseph Ellis) came to your mill in custody of an officer, or in company with a person whom he represented to be an officer, if so when, and what conversation took place in the presence of such third person? State fully.

"A. Ellis came down to the mill with the person I took to be an officer, after 6 P. M., and said he should want some money for his family; that parties had come over from Chelsea to carry him over there to settle for some property he had borrowed. I asked him why he didn't give up the property; he said that they refused to take the property, but offered to settle for \$15. I told Ellis that I didn't believe but what there was something more to it; he said that there wasn't, but that borrowed property was all they were after him for. The officer was right there, and I asked him if this borrowed property was what they were going to carry Ellis to Chelsea for to settle. He said that was all they had against him that he knew anything about."

Ellis v. Cleveland.

The whole deposition was admitted, and the defendant excepted. The plaintiff declared specially for damages "for the care and curing of his wife," and was allowed to show that she was made ill by his arrest, suffered a miscarriage, and was seriously ill for some time following the arrest; to which defendant excepted.

Hunton & Stickney, for the defendant, cited on the question of damages, *Holloway v. Turner*, 6 Q. B. 928; *Phillips v. Dickerson*, 85 Ill. 11; *Flint v. Bruce*, 68 Me. 183; and that the evidence was not admissible, Whart. Ev. s. 1204; *Jenne v. Joslyn*, 41 Vt. 484; *State v. Thibeaup*, 30 Vt. 100.

William H. Bliss and *J. J. Wilson*, for the plaintiff, cited on the question of damages, *Walden v. Clark*, 50 Vt. 383; *Dix v. Brooks*, 1 Stra. 61; 2 Chit. Pl. 850; and that the evidence was admissible, *State v. Humphrey*, 32 Vt. 569; 1 Greenl. Ev. s. 111; *U. S. v. Gooding*, 12 Wheat. 460; *Lamb v. Day*, 8 Vt. 411; *Mason v. Gray*, 36 Vt. 308; *Austin v. Chittenden*, 33 Vt. 553; *Tillotson v. McCrillis*, 11 Vt. 477.

The opinion of the court was delivered by

ROWELL, J. The third question and the answer thereto in Kezer's deposition were improperly admitted. It was, in effect, allowing the plaintiff to introduce his own sayings in his own favor, which a party cannot do, except in certain cases, of which this is not one.

There was also error in the admission of the testimony as to the wife's miscarriage and the expense of doctoring her consequent thereon. Such a result as her miscarriage was not such a natural and proximate consequence of the act complained of as to impose liability in this action by reason thereof. *Phillips v. Dickerson*, 85 Ill. 11. In cases of tort, it is necessary for the party complaining to show that the particular damages in respect of which he proceeds, are the legal and natural consequence of the wrongful act imputed to the defendant. Sedgw. Dam. (6th Ed.) 92. In *Huxley v. Berg*, 1 Stark. 98, which was trespass for breaking

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and entering plaintiff's dwelling-house and for a battery, the plaintiff was allowed to give in evidence that his wife was so terrified by the conduct of the defendant that she was immediately taken sick, and soon thereafter died; but this was held to be admissible for the purpose only of showing how outrageous and violent the breaking, etc., was, and not as a substantive ground of damages.

Reversed and remanded.

T. S. CLOUGH AND WIFE v. WM. W. CLOUGH.

Appeal. Set-off.

A set-off can only be pleaded against all the plaintiffs; hence, an action having been brought in the name of the husband and his wife, the matter in demand not exceeding \$20, as shown by the writ and specification, and the defendant in the justice court *pleading in set-off against the husband alone* an amount greater than \$20, such action is not appealable.

HEARD on motion to dismiss the appeal, May Term, 1882, ROWELL, J., presiding. Motion sustained. The case is stated in the opinion.

Lamb & Tarbell, for the plaintiffs.

S. M. Pingree, for the defendant.

The opinion of the court was delivered by

ROSS, J. The defendant's set-off pleaded before the justice of the peace, though of greater amount than twenty dollars, was against Thomas S. Clough alone, and for that reason properly rejected by the justice of the peace. A set-off can only be pleaded against all the plaintiffs in the action. The set-off therefore furnished no ground for an appeal from the judgment of the justice of the peace.

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The matter in demand, as shown by the plaintiffs' specifications, declaration, and *ad damnum* in the writ, did not exceed twenty dollars, and so the action was within the exclusive jurisdiction of the justice of the peace to try and determine, however many blunders he might commit therein. The declaration showed no cause for joining the wife as co-plaintiff, and if this had been taken advantage of properly, it would have been the duty of the justice of the peace to have so adjudged, but however erroneously he might discharge this duty it would furnish no ground for an appeal. The specifications showed an indebtedness to the wife for her separate estate. The copies of appeal do not show that the defendant objected to the insufficiency of the declaration in failing to set forth a cause of action in the wife. Under these circumstances it is not for the defendant to complain that the justice neither dismissed the action nor allowed the declaration to be amended. Nor did such defect, or insufficiency in the declaration, give the defendant the right to file in set-off a claim against one of the plaintiffs alone. If the cause of action was such that it ought to have been prosecuted in the name of the husband alone, he should have first taken measures to have eliminated the other plaintiff from the action by allowing a non-suit as to such plaintiff, and then have filed a set-off of more than twenty dollars against the remaining plaintiff, if he would have entitled himself to the right of an appeal to the County Court. On the facts stated in the appeal copies, it was the duty of the County Court to dismiss the appeal.

The judgment of the County Court is affirmed.

Premo v. Hewitt.

PETER PREMO AND HIS WIFE JULIA C. PREMO v.
W. R. HEWITT.

Exemption. Gift from Husband to Wife.

The husband owned a homestead and other property exempt from attachment. It was insured in the name of his wife. It burned; and the insurance money, with the knowledge and consent of the husband, was paid to her; and she, with his approbation, managed and treated it, and the property purchased with it, as her own. *Held,*

1. That it was equivalent to a valid gift.*
2. That property purchased with the insurance money was not attachable on the husband's debts;
3. Nor property purchased with the wife's earnings, when he has allowed her to use them as her separate estate;
4. Nor, the increase of such property, as of cows.
5. And the result is the same though the labor of the husband on the wife's farm may have helped to some extent to produce the property in contention.
6. R. L. s. 1075, earnings of married woman cannot be trustee, construed.

REPLEVIN, to replevy ten cows, fourteen young cattle, two swine, one cart, one buggy, one plow, one sleigh, and one sled. Heard by the court, May Term, 1882, ROWELL, J., presiding. Judgment of guilty as to all the property replevied except the sled, and for the plaintiffs to recover one cent damages and costs; and of not guilty as to the sled, and for a return thereof, and for the defendant to recover one cent damages and costs; but it appearing that the costs were not enhanced by reason of replevying the sled with the other property, the defendant's costs were restricted to a nominal sum. On trial it appeared that on the 15th day of November, 1864, said Peter Premo purchased a farm and took a deed to himself; that he and his wife resided on the farm till April 18th, 1877, when the buildings were burned; that he had the entire management of affairs; that he got badly in debt, was sued, his personal property sold on execution save what was

* See *Robb v. Brewer*, 15 Reporter, 648, May 23, 1883, where the Supreme Court of Iowa held that a gift by a husband to his wife of his *earnings exempt from execution*, was not a fraud on his creditors; and property purchased by her, paid for, in part, by such earnings, was not attachable by his creditors, citing *Dreutzer v. Bell*, 11 Wis. 114; 23 Wis. 164; 44 Iowa, 613.—R&P.

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exempt; that on the 26th day of October, 1875, one Smith having obtained a judgment levied his execution on all the said Premo's real estate, setting out the homestead as provided by law, which real estate was never redeemed; that on the 8th day of September, 1875, said Peter Premo had the buildings and their contents insured in his own name for \$2,078; that, after the set-off, the agent, through whom the first insurance had been effected, told the plaintiffs that the homestead belonged to Mrs. Premo, and should be insured in her name, whereupon the policy was surrendered and cancelled, and a new one issued to her, on her application, with the knowledge and consent of the husband; that in the last policy the buildings were insured for only \$1060, and other property, amounting in all to \$1377; and that the debt for which this suit was brought, and the property attached, antedates the set-off of the homestead. The court found and the exceptions showed:

"On the 18th day of April, 1877, said property was destroyed by fire, except the barn and contents. On the 9th day of May, 1877, said Julia filled out her proof of loss and made oath to the same, in which she claimed insurance for loss of property in the sum of \$1150, as follows: On house, \$1000; on clothing, \$150, which loss was finally adjusted by the company allowing on said policy, \$1138.96, which was paid to said Julia, her husband assenting, less \$8 allowed for interest and expenses. The title to said real estate remained in said Peter till the 25th day of March, 1878, when it was sold for the sum of \$100, said Julia joining with said Peter in the deed.

"On the third day of October, 1877, said Julia purchased of Joel H. Willis his homestead farm in Bridgewater, which was deeded to said Julia by Willis and wife; the consideration named in said deed was \$2250. On the same third day of October, 1877, said Julia and Peter executed to said Willis and wife a mortgage deed for the sum of \$1500, to secure the balance of the purchase money. Said Peter and wife soon moved on to said farm, where they have ever since lived, and of which the said Julia has had the management and control. At the time of the sale of said farm, as aforesaid, there was included seven calves, a quantity of hay and all sugar utensils on the place, for which said Willis and wife executed a bill of sale to said Julia. On the seventh day of August, said Julia purchased of Levi Premo, a brother of Peter, one two-horse wagon, one express wagon, (which is the one in controversy, and called a buggy,) and one square box sleigh, and paid for them out of the insurance money. At the time of this sale Levi Premo executed to said Julia a bill of sale of the articles sold.

"A short time after Premo and wife moved on to the Bridgewater farm, Peter Premo saw Geo. E. Smith at an auction, and inquired of him if he had any cows for sale. A short time after this Premo and wife came to Smith's; Smith and Premo went into the cattle yard, and examined the cattle. Mrs. Premo did not go into the yard, but sat in the car-

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riage near by. Premo and his wife both talked with Smith about buying the cows, but Smith in fact traded with Mrs. Premo, and sold the cows to her. Smith preserved a lien on said four cows, which was signed by Mrs. Premo alone ; but being informed that a married woman could not contract in that way, Smith afterwards obtained the signature of Premo to it. Afterwards Smith sold two more cows to Mrs. Premo in the same manner. These were six of the cows replevied. Said cows have not yet been paid for. Three of the other cows came from these Smith cows, and one was of the seven calves bought with the farm. Of the young cattle, ten came from the Smith cows ; three of the young cattle Mrs. Premo bought when calves, and paid for in butter sold from the farm. She paid fifty cents each for them. The other she had of Richard Bradley and paid for in sewing. Mrs. Premo bought a pig of Richard Bradley for \$2.50. She paid \$1.50 in sewing and \$1.00 in butter from the farm, and the hogs in question were raised on the farm from that pig. The cart was thrown in in an ox trade, which was paid for by turning out a note for \$100, given to Mrs. Premo to pay for a pair of horses which she bought and paid for out of the insurance money and which she had sold, and by Mrs. Premo's giving her note for \$25, which has since been paid. The plow Mrs. Premo bought in Rutland and has not paid for it.

" At the time of the purchase of the Bridgewater farm, neither Premo nor his wife had any money or property except the insurance money. The \$750 paid in towards the farm, and all the personal property on the farm, came from the insurance money and accumulations since. Since the purchase of the Willis farm Premo and wife have lived thereon, but she has had the management and control thereof, though Premo has worked on it, but exercised no control over it. All he has done has been on the farm except he has occasionally worked a little at his trade of a wheelwright.

" At the time this property was attached by Hewitt on the Perry writ it was all on said Willis' farm, where Premo and wife were then living.

" That all the property thus insured to her was property that was by law exempt from attachment by the creditors of her husband ; that the money arising from the loss of that property by fire was paid to her by her husband's consent ; that she assumed and had control of the money and continued to control it ; that whatever she did in that direction, controlling that money, or buying property with it, she did with the double purpose of preventing her husband's creditors from getting the property and for the purpose of more surely obtaining a home for herself and family."

The property in contention was attached by defendant as an officer. The other facts are stated in the opinion of the court.

Norman Paul, for the defendant.

The wife has but an inchoate lien upon the homestead. *Whitman v. Field*, 53 Vt. 554. The homestead exemption is limited in value to \$500, and however liberal courts have been in construing statutes relating to the homestead right, they have no author-

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ity to extend this statutory limit. When the plaintiffs purchased the Bridgewater farm, and paid the \$750 towards the purchase price, and occupied the same, that became their homestead, and they could make no claim that any other money they possessed was exempt from attachment on the ground of the homestead right. R. L. s. 1894; *McClary v. Bizby*, 36 Vt. 254; *Keyes v. Rains*, 37 Vt. 260; *Executor of Doane v. Doane*, 46 Vt. 485; *Bugbee v. Bemis*, 50 Vt. 216.

The claim of ownership of the property in controversy made by the wife cannot be sustained; it is not property that she held in her own right, or that has come to her by devise or inheritance. 2 Bishop Married Women, ss. 135, 136, 137; Kerr F. Mistake, 196; *Crane v. Stickles*, 15 Vt. 252; *Prout v. Vaughan*, 52 Vt. 457. The husband, by virtue of his marital rights, is entitled to the wife's earnings during coverture, and all the property bought with such earnings is his. 2 Bishop Married Women, s. 82; Schouler Dom. Rel. 61, 75; 1 Parsons Con. 286; *Davis v. Burnham*, 27 Vt. 562.

French & Southgate, for the plaintiffs, contended substantially as held by the court; and cited, *Richardson v. Merrill's Est.* 32 Vt. 217; *Caldwell v. Renfrew*, 33 Vt. 213, 217; *Cardell v. Ryder*, 35 Vt. 47; *Richardson v. Wait*, 39 Vt. 535; *Child v. Pearl*, 43 Vt. 224; *Bent v. Bent*, 44 Vt. 555; *Perry v. Wheelock*, 49 Vt. 66; *Spooner v. Reynolds*, 50 Vt. 437; *Leavitt v. Jones*, 54 Vt. 426.

The opinion of the court was delivered by

Ross, J. The County Court have found that all the property insured to Mrs. Premo, both when insured and burned, was property that was exempt from attachment and levy of execution, on debts due her husband's creditors; that the insurance thereof was taken to Mrs. Premo, and the money arising from the loss thereof paid to her with the knowledge and consent of her husband; and that since its payment to her in 1877, she has, with the approbation of her husband, managed and treated it and the property purchased therewith as her sole and separate property. This is

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equivalent to finding that the husband made a gift of the insurance policy and the money received thereon to her. Inasmuch as it was property which could not be taken by his creditors in satisfaction of his debts, the motive which induced him to make, and her to accept, the gift, does not concern them. The property being, as against them, set apart by law to furnish a home for the family, she had the right to receive it as a gift from her husband, with the intention and purpose of keeping and using it to furnish a home for the family, although the accomplishment of this end would operate and so become a part of her intention to keep it away from the creditors of her husband. The intention to keep the homestead and other exempt property from being taken by the creditors of the owner is, if not the intention, the direct operation of the statutes creating the exemptions. It cannot be unlawful for the wife to take as a gift such property, with the purpose to use and keep it just as the statute provides it may be used and kept. Such purpose no more withdraws it from the use of the creditors of the husband than does the statute itself. The right of the husband to give to the wife the avails arising from a sale of the homestead as against his creditors who had no right to take the homestead in satisfaction of their debts, has been fully recognized by this court in *Keyes v. Rines*, 37 Vt. 260, and *Morgan v. Stearns*, 41 Vt. 398.

But it is contended that the defendant should have returned to him that portion of the property which is found to have been purchased with the earnings of the wife. This contention is made on the ground that, at common law, the earnings of the wife belong to the husband. By our statute (R. L. s. 1075,) the earnings of the wife are not subject to be taken by creditors of the husband in satisfaction of their debts. The husband may, therefore, give these to the wife, and work no wrong or fraud upon his creditors. When he allows her to take and use her personal earnings to purchase property for herself, he in effect makes a gift thereof to her, and the property so purchased becomes the separate property of the wife. From the very nature of the transaction the husband relinquishes all marital rights over property which he himself

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gives to the wife to hold as her separate estate. *Bent v. Bent*, 44 Vt. 555.

It is further contended that the labor of the husband since the purchase by the wife of the farm in Bridgewater has helped to produce the property in contention. This may be true to some extent. However it may be morally, legally a man is not bound to work to pay off his creditors. They have no legal power to compel him to work for them or the payment of their debts, nor power to attach or appropriate to the payment of their debts his future earnings. R. L. s. 1075. He has the right to work upon the wife's land, and thereby increase its value, and such increase can be reached neither at law nor in equity. *Pierce v. Pierce Est.*, 25 Vt. 511; *White v. Hildreth*, 32 Vt. 265; *Webster v. Hildreth*, 33 Vt. 457.

The judgment of the County Court is affirmed.

CHARLES MORGAN v. KIDDER & ROBINSON.

Trover. Conditional Sale. Damages.

1. The plaintiff sold a herd of cattle conditionally, taking a note therefor for \$837.50 and a lien by which they were to remain his until the note was "fully paid." The vendee, without the knowledge of the plaintiff, sold a part of the cattle to the defendants, who paid him, and he paid the plaintiff, the plaintiff endorsing it on the note. In an action of trover, the note remaining unpaid, held, that the defendants were liable; and that the money paid by them could not be allowed in mitigation of damages.*
2. The lien was recorded; the title was in the plaintiff till the whole debt was paid; the defendants were charged with notice of these facts; and their good faith cannot help them.
3. Evidence was not admissible in mitigation of damages to show that the identical bank bills paid for the cattle were sent to the plaintiff, he being ignorant of the sale.
4. *Plevin v. Henshall*, 25 E. C. L. 21,—distinguished.

* See *Wade v. Hennessey*, ante, 207; also *Jellett v. R. R. Co.*, 15 Reporter, 629, May 16th, 1883, where the Sup. Ct. of Minnesota held that a carrier was liable for the full value of a car-load of corn, although \$70 had been paid, the conversion being an unauthorized delivery to the vendee before payment of the balance, \$30.50.—RER.

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TROVER for oxen. Plea, general issue. Trial by jury, December Term, 1882, TAFT, J., presiding. Verdict for plaintiff to recover \$160. The facts are sufficiently stated in the opinion of the court, except the following: In mitigation of damages the defendants offered evidence to show that they acted in good faith; and that the identical bank bills received for the oxen were sent to the plaintiff by the conditional vendee. But the defendants did not claim to be able to show the plaintiff, when he received the money, knew that it was the price of the oxen, or that they had been sold. The evidence was excluded.

J. J. Wilson, for the defendants.

The money paid for the oxen and received by the plaintiff, should go in mitigation of damages. This is the rule where there is no bad faith. *Plevin v. Henshall*, 25 E. C. L. 17; *Irish v. Cloyes*, 8 Vt. 30; *Lamb v. Washburn*, 9 Vt. 302; *Collins v. Perkins*, 31 Vt. 624; *Montgomery v. Wilson*, 48 Vt. 616.

Wm. H. Bliss and *Hunton & Stickney*, for the plaintiff, contended substantially as the court hold, citing *Thrall v. Lathrop*, 80 Vt. 307; *Coles v. Clark*, 3 Cush. 399; *Hall v. Ray*, 40 Vt. 576; *Smith v. Foster*, 18 Vt. 182; 26 Vt. 476.

The opinion of the court was delivered by

VEAZEY, J. Morgan sold a herd of cattle to Green upon condition that the cattle were to remain the property of Morgan until the note which Green gave for the cattle should be "fully paid." The price of the cattle was \$837.50, and this was the amount of the note, which was dated April 2d, 1877, and was payable with interest annually at the rate of \$150 per year, except the last payment which was a balance of \$87.50. In the herd thus sold was the yoke of oxen in question, which Green sold to those defendants for \$128, and paid the money to Morgan and the latter indorsed it on the note. The lien reserved was recorded as the statute provides. This transaction is called a chattel mortgage

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in the bill of exceptions. It was in fact a conditional sale. This note not having been paid, Morgan brings this suit in trover against the purchasers of the oxen, and the defendants claim that as the plaintiff had the money paid for the oxen, the same should be allowed in mitigation of damages. The lien reserved was in legal effect a security upon the whole property for the entire debt. This is the rule in the case of a mortgage of real estate, and the reason for the rule when applied to a chattel mortgage is greater than in case of real estate security. Personal property, and especially live stock, is less stable—more liable to deterioration, more fluctuating in price. It holds a lower grade as security. The title in these oxen remained in Morgan until the whole debt was paid; and Green had no right to sell them without Morgan's consent, and the defendants were charged with notice of these facts. Green's obligation was to pay the debt as the instalments fell due, and he had no right to part with or diminish the security. Therefore the payment by Green of the money received for the oxen, to Morgan, is no ground for mitigating the damages in this suit against the purchaser. They bought of Green cattle belonging to Morgan, and which it was Green's duty to keep until his debt was paid, and they paid the money to Green, and his payment of it to Morgan was simply discharging his duty to pay his debt, but did not release him from his other duty to keep the security good, or give the defendants any right to that security, or release them from their obligation to reimburse Morgan for their interference with his property. Upon the facts as offered to be shown by the defendants which were excluded by the County Court, the defendants paid nothing to Morgan, and he never consented to their buying the oxen. Morgan simply took the money paid to him by his debtor Green and applied it on his note without even knowledge then of the transaction between Green and the defendants. Morgan thereby only exercised a right and performed a duty, and his subsequent knowledge of the wrongful act between Green and the defendants did not affect his right or duty as to that money, or cure the wrong of the other parties. His right to the whole security until his debt was paid was a continuing right. That was not affected by a diminution of the debt by payments. The sale

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as it was made was unlawful. Green could not without Morgan's consent transfer title. The defendants converted the oxen belonging to Morgan when they refused to give them up, and have not since paid *him* anything. Nor had *they* paid him before. They had constructive legal notice of Morgan's right, therefore their good faith in fact cannot help them. *Thrall v. Lathrop*, 30 Vt. 307; *Coles v. Clark*, 3 Cush. 399. The case is distinguishable from *Plevin v. Henshall*, 25 E. C. L. 21, (10 Bing. 24). That was trover for cattle. After verdict for the plaintiff the cattle were seized in the hands of the defendant for rent which became due from the plaintiff to his landlord after the verdict. The defendant having paid the rent, the court allowed him to deduct the amount from the verdict found for the plaintiff which was the value at the time of the trial. The deduction was allowed on the ground that the defendant had by the payment of the rent due from the plaintiff satisfied the damages *pro tanto*. TINDAL, Ch. J., said: "The effect is the same whether the cattle were taken from the hands of the plaintiff or defendant. The parties are in the same situation as if the defendant had gone to the plaintiff after the verdict and had paid £118, the sum distrained for."

In this case Green had no right to dispose of the oxen to raise money with which to make a payment on his debt. The wrong to the plaintiff, which the sale and conversion worked, was, to diminish the plaintiff's security which Green was bound to keep good until the whole debt was paid. If the avails of the cattle had paid the whole debt, there would be good reason for mitigating the damages, although the sale took place before the debt was paid. If the proceeds of the sale should be allowed in mitigation here, the plaintiff derives no benefit, because, although Green's debt to him was diminished, he has lost or been compelled to part with an equivalent amount of property. In the English case, *supra*, the plaintiff derived a benefit by having his *own* debt paid out of the judgment which he recovered. *Montgomery v. Wilson, et. al.*, 48 Vt. 616, is a similar case. The general rule is well settled as claimed by the defendants that in actions of trespass and trover, if the goods are returned or the avails have passed to the plaintiff or gone to his use, damages will be mitigated to the ex-

tent shown. But the rule does not apply to this case, because it cannot strictly be said that the avails have gone to the plaintiff's use. The sale and the conversion by the defendants infringed the plaintiff's contract right to have the oxen remain in Green's possession as security until the whole debt was paid. The offer of the defendants on the trial did not meet the requirements as above shown, and the evidence would not have availed them if admitted.

Judgment affirmed.

| <i>Non-Fulfillment of Contract.</i> | <i>Damages.</i> | <i>Recoupment.</i> |
|-------------------------------------|------------------------|------------------------|
| <i>Reference.</i> | <i>Set-off.</i> | |
| 1. <i>Contract.</i> | 1. <i>Contract.</i> | 1. <i>Contract.</i> |
| 2. <i>Performance.</i> | 2. <i>Performance.</i> | 2. <i>Performance.</i> |
| 3. <i>Defect.</i> | 3. <i>Defect.</i> | 3. <i>Defect.</i> |
| 4. <i>Remedy.</i> | 4. <i>Remedy.</i> | 4. <i>Remedy.</i> |
| 5. <i>Set-off.</i> | 5. <i>Set-off.</i> | 5. <i>Set-off.</i> |
| 6. <i>Recoupment.</i> | 6. <i>Recoupment.</i> | 6. <i>Recoupment.</i> |
| 7. <i>Reference.</i> | 7. <i>Reference.</i> | 7. <i>Reference.</i> |
| 8. <i>Set-off.</i> | 8. <i>Set-off.</i> | 8. <i>Set-off.</i> |
| 9. <i>Recoupment.</i> | 9. <i>Recoupment.</i> | 9. <i>Recoupment.</i> |
| 10. <i>Reference.</i> | 10. <i>Reference.</i> | 10. <i>Reference.</i> |
| 11. <i>Set-off.</i> | 11. <i>Set-off.</i> | 11. <i>Set-off.</i> |
| 12. <i>Recoupment.</i> | 12. <i>Recoupment.</i> | 12. <i>Recoupment.</i> |
| 13. <i>Reference.</i> | 13. <i>Reference.</i> | 13. <i>Reference.</i> |
| 14. <i>Set-off.</i> | 14. <i>Set-off.</i> | 14. <i>Set-off.</i> |
| 15. <i>Recoupment.</i> | 15. <i>Recoupment.</i> | 15. <i>Recoupment.</i> |
| 16. <i>Reference.</i> | 16. <i>Reference.</i> | 16. <i>Reference.</i> |
| 17. <i>Set-off.</i> | 17. <i>Set-off.</i> | 17. <i>Set-off.</i> |
| 18. <i>Recoupment.</i> | 18. <i>Recoupment.</i> | 18. <i>Recoupment.</i> |
| 19. <i>Reference.</i> | 19. <i>Reference.</i> | 19. <i>Reference.</i> |
| 20. <i>Set-off.</i> | 20. <i>Set-off.</i> | 20. <i>Set-off.</i> |
| 21. <i>Recoupment.</i> | 21. <i>Recoupment.</i> | 21. <i>Recoupment.</i> |
| 22. <i>Reference.</i> | 22. <i>Reference.</i> | 22. <i>Reference.</i> |
| 23. <i>Set-off.</i> | 23. <i>Set-off.</i> | 23. <i>Set-off.</i> |
| 24. <i>Recoupment.</i> | 24. <i>Recoupment.</i> | 24. <i>Recoupment.</i> |
| 25. <i>Reference.</i> | 25. <i>Reference.</i> | 25. <i>Reference.</i> |
| 26. <i>Set-off.</i> | 26. <i>Set-off.</i> | 26. <i>Set-off.</i> |
| 27. <i>Recoupment.</i> | 27. <i>Recoupment.</i> | 27. <i>Recoupment.</i> |
| 28. <i>Reference.</i> | 28. <i>Reference.</i> | 28. <i>Reference.</i> |
| 29. <i>Set-off.</i> | 29. <i>Set-off.</i> | 29. <i>Set-off.</i> |
| 30. <i>Recoupment.</i> | 30. <i>Recoupment.</i> | 30. <i>Recoupment.</i> |
| 31. <i>Reference.</i> | 31. <i>Reference.</i> | 31. <i>Reference.</i> |
| 32. <i>Set-off.</i> | 32. <i>Set-off.</i> | 32. <i>Set-off.</i> |
| 33. <i>Recoupment.</i> | 33. <i>Recoupment.</i> | 33. <i>Recoupment.</i> |
| 34. <i>Reference.</i> | 34. <i>Reference.</i> | 34. <i>Reference.</i> |
| 35. <i>Set-off.</i> | 35. <i>Set-off.</i> | 35. <i>Set-off.</i> |
| 36. <i>Recoupment.</i> | 36. <i>Recoupment.</i> | 36. <i>Recoupment.</i> |
| 37. <i>Reference.</i> | 37. <i>Reference.</i> | 37. <i>Reference.</i> |
| 38. <i>Set-off.</i> | 38. <i>Set-off.</i> | 38. <i>Set-off.</i> |
| 39. <i>Recoupment.</i> | 39. <i>Recoupment.</i> | 39. <i>Recoupment.</i> |
| 40. <i>Reference.</i> | 40. <i>Reference.</i> | 40. <i>Reference.</i> |
| 41. <i>Set-off.</i> | 41. <i>Set-off.</i> | 41. <i>Set-off.</i> |
| 42. <i>Recoupment.</i> | 42. <i>Recoupment.</i> | 42. <i>Recoupment.</i> |
| 43. <i>Reference.</i> | 43. <i>Reference.</i> | 43. <i>Reference.</i> |
| 44. <i>Set-off.</i> | 44. <i>Set-off.</i> | 44. <i>Set-off.</i> |
| 45. <i>Recoupment.</i> | 45. <i>Recoupment.</i> | 45. <i>Recoupment.</i> |
| 46. <i>Reference.</i> | 46. <i>Reference.</i> | 46. <i>Reference.</i> |
| 47. <i>Set-off.</i> | 47. <i>Set-off.</i> | 47. <i>Set-off.</i> |
| 48. <i>Recoupment.</i> | 48. <i>Recoupment.</i> | 48. <i>Recoupment.</i> |
| 49. <i>Reference.</i> | 49. <i>Reference.</i> | 49. <i>Reference.</i> |
| 50. <i>Set-off.</i> | 50. <i>Set-off.</i> | 50. <i>Set-off.</i> |
| 51. <i>Recoupment.</i> | 51. <i>Recoupment.</i> | 51. <i>Recoupment.</i> |
| 52. <i>Reference.</i> | 52. <i>Reference.</i> | 52. <i>Reference.</i> |
| 53. <i>Set-off.</i> | 53. <i>Set-off.</i> | 53. <i>Set-off.</i> |
| 54. <i>Recoupment.</i> | 54. <i>Recoupment.</i> | 54. <i>Recoupment.</i> |
| 55. <i>Reference.</i> | 55. <i>Reference.</i> | 55. <i>Reference.</i> |
| 56. <i>Set-off.</i> | 56. <i>Set-off.</i> | 56. <i>Set-off.</i> |
| 57. <i>Recoupment.</i> | 57. <i>Recoupment.</i> | 57. <i>Recoupment.</i> |
| 58. <i>Reference.</i> | 58. <i>Reference.</i> | 58. <i>Reference.</i> |
| 59. <i>Set-off.</i> | 59. <i>Set-off.</i> | 59. <i>Set-off.</i> |
| 60. <i>Recoupment.</i> | 60. <i>Recoupment.</i> | 60. <i>Recoupment.</i> |
| 61. <i>Reference.</i> | 61. <i>Reference.</i> | 61. <i>Reference.</i> |
| 62. <i>Set-off.</i> | 62. <i>Set-off.</i> | 62. <i>Set-off.</i> |
| 63. <i>Recoupment.</i> | 63. <i>Recoupment.</i> | 63. <i>Recoupment.</i> |
| 64. <i>Reference.</i> | 64. <i>Reference.</i> | 64. <i>Reference.</i> |
| 65. <i>Set-off.</i> | 65. <i>Set-off.</i> | 65. <i>Set-off.</i> |
| 66. <i>Recoupment.</i> | 66. <i>Recoupment.</i> | 66. <i>Recoupment.</i> |
| 67. <i>Reference.</i> | 67. <i>Reference.</i> | 67. <i>Reference.</i> |
| 68. <i>Set-off.</i> | 68. <i>Set-off.</i> | 68. <i>Set-off.</i> |
| 69. <i>Recoupment.</i> | 69. <i>Recoupment.</i> | 69. <i>Recoupment.</i> |
| 70. <i>Reference.</i> | 70. <i>Reference.</i> | 70. <i>Reference.</i> |
| 71. <i>Set-off.</i> | 71. <i>Set-off.</i> | 71. <i>Set-off.</i> |
| 72. <i>Recoupment.</i> | 72. <i>Recoupment.</i> | 72. <i>Recoupment.</i> |
| 73. <i>Reference.</i> | 73. <i>Reference.</i> | 73. <i>Reference.</i> |
| 74. <i>Set-off.</i> | | |

The contract was made by letters. The defendant supposed he had ordered a cider-press with counter-shaft attachment; but when it came he found it was a press with power attachment with chain-belt. He knew what he had received, and that the price was \$28 more than that of the other. It being late in the season, and his customers pressing him to do their work, the defendant set up and used the press. The plaintiff, supposing the order to call for the machine which he had sent, gave wrong directions as to the timbers needed in setting it up, and injury resulted in consequence to the defendant. The defendant wrote asking the plaintiff if he could ship the press "at once"; and the plaintiff replied that he could, "on short notice." In a few days thereafter, September 4, 1880, the defendant ordered it to be shipped "immediately." September 13th, he wrote again, saying that he had heard nothing from his order; and September 15th the plaintiff replied that the press would be shipped "that day or the next." It was not shipped so as to be received until September 30th, 1880. In an action of assumpsit to recover the price, *Held*,

1. That by setting up and using the press the defendant accepted it.
2. That all the facts show that both parties contemplated an immediate fulfillment of the order to ship the press.
3. That the plaintiff is liable for all damages resulting directly and naturally from his delay in performing the contract, and for his erroneous directions as to using the timbers in setting up the press,—and, hence, is liable for loss incurred in changing the timbers, loss of time of workmen, and loss on the stock ; but not for the loss of *custom*, it being too indirect and remote.

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4. That, the case having been referred, the pleadings could be amended so as to embrace a plea of set-off, if necessary ; but the defendant may show, *in recoupment*, or reduction of the damages, such damages as he has sustained by a breach of the contract.*

ASSUMPSIT. Heard on the report of a referee, December Term, 1882, TAFT, J., presiding. Judgment for the plaintiff to recover \$291.75. The judgment was made up of the price of a cider press, \$200 ; power attachment with chain belt, \$45 ; interest, \$34.64 ; and some other small items connected with the press. It appeared that the plaintiff in 1878 had sold to one Ames a cider press with counter-shaft attachment ; that he arranged with Ames to give him a commission of ten per cent. on all presses sold by him, but he had no power to make prices or collect the pay ; that the plaintiff did not begin to manufacture the kind of cider press which he shipped the defendant till about the middle of August, 1880, which press he called "power attachment with chain belt ;" that the only press Ames or the defendant knew about was "with counter-shaft attachment ;" and that, as the referee found :

"Ames from time to time had talk with defendant about selling him one of the plaintiff's presses ; and on the 11th day of August, 1880, wrote plaintiff for prices for the presses, to which he replied Aug. 14th, giving price for No. 3 press \$200, and for counter-shaft \$17, and stating that he would allow Ames ten per cent. commission for all he could sell when paid for ; and no mention was made in that letter of any other way of applying power to the press except by way of counter-shaft.

"August 30th, 1880, Ames writes plaintiff acknowledging receipt of his letter of Aug. 14th, and stating that he will doubtless receive an order from O. N. Stoughton of Royalton, Vt., for a press, and that he would probably want power attachment. The only power attachment that Ames then knew about was counter-shaft.

"On the 17th day of August, 1880, the defendant wrote the plaintiff asking for prices for presses to be run by power. To this letter the plaintiff replied Aug. 26th, 1880, giving the price of No. 3 press at \$200, and counter-shaft \$17 ; power attachment with chain belt \$45, to run presses by power. Defendant replied Aug. 27th, asking if plaintiff would warrant his No. 3 press of sufficient strength for power attachment, and if so he should use that size ; and asking if plaintiff had the press in store so he could ship at once, also counter-shaft power attachment. Plaintiff replied Aug. 28th, that he would warrant the presses perfect when delivered, and that 'he had the presses, power attachment and counter-shafts at the factory, and can ship them at short notice.' Defendant then in a short time saw Ames, and directed Ames to order a

* But if a plea of set-off includes a *note*, and therefore separate, independent of the cause of action, that it must be filed *before* reference, see *Fulton v. Wiley*, 32 Vt. 762. —**REP.**

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No. 3 press from plaintiff. Ames did not know of this correspondence between plaintiff and defendant, and never knew of it until the commencement of this suit, and did not then know of any other way of applying power to a press except by counter-shaft.

"The defendant intended to have Ames order for him a press, with power applied by way of counter-shaft. The defendant was entirely ignorant of presses and the way they ran except what knowledge he had derived from seeing Ames' press. According to the directions of defendant, Ames, Sept. 4th, 1880, wrote plaintiff to send immediately to O. N. Stoughton, Royalton, Vt., a No. 3 press, also power attachment and everything complete. Ames intended by said letter to order a press with power applied by way of counter-shaft.

"About the middle of August, 1880, the plaintiff began to manufacture in a way to apply power to presses by what he called power attachment with chain belt, which the plaintiff considered preferable to the counter-shaft, and for which he asked \$45; and the plaintiff supposed, when he received said order in Ames' letter of Sept. 4th, which was after the correspondence between plaintiff and defendant, that what was desired was power attachment with chain belt.

"On the 13th of September Ames wrote to plaintiff as follows: 'I have not heard anything from my order, and I am ready to use it. Please ship immediately to O. N. Stoughton, Royalton, Vt. It was for No. 3 press and power attachment. . . . Please send dimensions of timber and directions for setting up.' On the 15th of September, 1880, plaintiff wrote Ames that they wrote him from the factory that the press would be sent today or the next, and also enclosed in said letter directions for timbers. It appeared that all of the press which plaintiff was expected to furnish were the irons, leaving the defendant to make the timbers and put up the press, and defendant employed Ames to do this.

"The directions in reference to timbers could only be used with a press with power attached by way of counter-shaft, and could not be used with press where power is applied by means of power attachment with chain belt. The defendant had arranged with Ames, who was a mechanic, to get out said press timbers, and set up said press. Immediately after receipt of letter of Sept. 15th, said Ames began making said timbers according to said directions, and completed the same; and some portion of the press not having arrived, said Ames left off work and went home, and returned Sept. 30th, and then found that plaintiff sent power attachment and chain belt instead of counter-shaft, as he, Ames, expected would be sent.

"The defendant claimed that he should be chargeable with only \$17 for the power attachment with chain belt, instead of \$45 as charged in the bill, and should be allowed for extra expense of putting up the press and loss of time by workmen and their board, \$50, and by loss by not having the press, loss of custom and loss of stock on hand, \$25.

"In reference to first item claimed by defendant I find that \$17 was the price of the attachment by counter-shaft, which defendant and Ames both supposed they had ordered and were to have, and that they used the power attachment sent because the same came so late in the season that they were compelled to use it or forego having any press that season. As to the second item, I find that the defendant kept his help from day to day, expecting the press would come each day, until he expended the amount charged. As to the third item, I find that defendant incurred the loss charged by reason of the delay in sending forward the press

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and attachments. The plaintiff had informed both Ames and defendant about the time of the order, that he had counter-shaft and power attachment, and could forward the same on a few days' notice; and plaintiff testified that he expected he would have been able to have forwarded the same on two or three days' notice. The delay was occasioned by the fact that the chain belt was a patented article, and only manufactured at one place, and plaintiff was delayed in procuring it. As soon as he could procure it the same was forwarded. These facts were known to plaintiff but were not known or communicated to defendant or Ames."

The other facts are stated in the opinion of the court.

D. C. Denison & Son, for the defendant.

We submit that the defendant, under the facts, is bound only to pay for the press and power attached by counter-shaft; and that whatever damage was occasioned to him by the unreasonable delay in delivering the property purchased and for the erroneous directions he would be entitled to recover of the plaintiff. In either view, the report shows the tender to be abundantly sufficient and judgment should be entered for defendant to recover his costs. *Hubbard v. Fisher*, 25 Vt. 539; *Keyes v. Slate Co.* 34 Vt. 81; *Allen v. Hooker*, 25 Vt. 137; *Thompson v. Congdon*, 43 Vt. 396.

Lamb & Tarbell, for the plaintiff.

The defendant had his choice to decline to receive the goods, offer to return them, and give immediate notice of a rescission of the contract, or to keep them and pay the contract price. 2 Kent, 470; *Boughton v. Standish*, 48 Vt. 594; *Gilson v. Bingham*, 48 Vt. 410; 14 Conn. 414; *Esty v. Rand*, 29 Vt. 278; 26 Vt. 87; 48 Vt. 83.

The opinion of the court was delivered by

Ross, J. The defendant supposed he had ordered a press with counter-shaft attachment. When it came he found it was a press with power attachment with chain-belt. He knew what he had received and what the plaintiff's price was for the same; that the power attachment with chain-belt was forty-five dollars, while with counter-shaft it was but seventeen dollars. By setting up and using the press and power attachment with chain-belt he accepted

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the same, and bound himself to pay the price which he knew the plaintiff asked for that kind of press and attachment. That he was induced to accept it by the stress of circumstances in which he was placed, did not qualify the acceptance, nor lessen, nor modify, the legal effect thereof. That he notified the plaintiff of the mistake, and that the plaintiff undertook to give him leave to exchange the attachments, do not vary the legal relations of the parties. He set up the press with the power attachment sent before he received the plaintiff's letter giving him leave to exchange, and still retains and uses the power attachment with chain-belt. Under these circumstances, the plaintiff has the right to recover the price which the defendant knew he asked for the press and power attachment when he received and accepted the same. *Gilson v. Brigham*, 43 Vt. 410.

II. During the negotiations, which were carried on by letters, the defendant asked the plaintiff if he had the presses and counter-shaft power attachments in store so that he could ship at once. The plaintiff replied that he had the presses, power attachments and counter-shafts at the factory and could ship on short notice. In a few days thereafter, the defendant ordered the press and power attachment to be sent immediately. This was September 4, 1880. September 13, 1880, the defendant wrote the plaintiff that he had heard nothing from his order, to ship immediately; that he was ready to use it, and asked for directions in regard to the timbers to be used in setting up the press. He received a reply September 15, saying that the press would be shipped that day, or the next, and also giving directions in regard to the timbers required. The defendant went immediately about making preparation to set up the press. The press was not shipped complete so as to be received until September 30th. The directions in regard to the timbers, given in the plaintiff's letter of September 15, were for those necessary for the counter-shaft attachment. The plaintiff then understood the defendant's order to call for the power attachment with chain-belt, and by some mistake gave the wrong directions. On these facts the defendant contends that the press and power attachment were not shipped so early as required by the contract; that he suffered damages by the non-fulfillment

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in this respect, on the part of the plaintiff; and that he should be allowed to reduce the amount of damages due the plaintiff by the amount of damages he has sustained by the extra expense in putting up the press, and loss of time of his workmen, and in loss of custom, and loss of stock on hand. The referee has found that the defendant sustained damages in all these respects. The plaintiff claims that, inasmuch as no definite time was agreed upon for the shipment of the press and power attachment, he cannot be held liable for damages occasioned by the delay. When no definite time is fixed by the contract in which an act thereby agreed to be done is to be performed, the law implies it is to be performed within a reasonable time. In determining what is a reasonable time, regard is to be had to the circumstances and what the parties, from what passes between them, do or have a right, acting as prudent men, to understand is a reasonable time for performance. The defendant inquiring of the plaintiff if he had the presses in store so that he could ship at once, his order to ship at once, and immediately, as he wanted the press to use, as well as the defendant's reply that he had them at the factory and could ship on short notice, and that it would be shipped that day or the next,—all show that both parties contemplated an immediate fulfillment of the order. The fact that the plaintiff had to send to Chicago for the power attachment with the chain-belt and was delayed in obtaining the same, not communicated to the defendant, neither before nor when the order was received and accepted by him, does not vary the legal relations of the parties in regard to the time in which the plaintiff was bound to fill the order and ship the press. The plaintiff was made aware that the defendant was ready to use the press, and that he was preparing to set it up as soon as received. This being the legal relation of the parties in regard to the time of the performance of the contract by the plaintiff, he must be held liable to the defendant for all damages resulting directly and naturally from his delay in the performance thereof. It is contended by the plaintiff that he was under no obligation, by the terms of the contract, to give defendant directions in regard to the timbers he would need to set up the press. It would be naturally expected by a purchaser, when the machine

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purchased is to be set up in a particular manner to do good and effective work, that the vendor would furnish directions in that particular. In the case at bar, the defendant called upon the plaintiff for such directions, and he furnished them without objection. It is too late for him, after the directions have been treated by both parties as a part of the contract and acted upon, as the plaintiff had every reason to suppose they would be, to contend that they are not a part of the contract. We think that the plaintiff is liable to the defendant for the loss incurred by him in changing the timbers, and for the loss of time of his workmen, and for the loss on his stock, occasioned by the plaintiff's breach and non-fulfillment of the contract, in giving erroneous directions, and by unreasonable delay in shipping the press. The loss of custom, we think, is too indirect and remote to be allowed as the direct and natural result of the plaintiff's non-performance of the contract.

The plaintiff further contends that the defendant cannot be allowed these damages in this suit, which is said to be *assumpsit* in the common counts, with no plea filed except the general issue. It is the general doctrine in regard to judgments on referees' reports, announced in repeated decisions of this court, that the judgment shall be in accordance with the facts reported, if the pleadings can legally be so amended as to accommodate themselves to, and include, the facts reported. There can be no doubt but that the pleadings could be legally amended in this case so as to embrace a plea of set-off in *assumpsit* founded on a breach of the same contract in suit, nor that the defendant would be entitled to recover these damages under such plea. But we do not think such plea necessary to entitle the defendant to the allowance of these damages in this suit. They arise out of the same contract on which the plaintiff grounds his right of recovery. When a defendant is sued for a breach or enforcement of a contract, he may show, in recoupment or reduction of the damages which the plaintiff is entitled to recover, such damages as he has sustained by the plaintiff's breaches of the same contract. *Hartland v. Henry*, 44 Vt. 593; *Davenport v. Hubbard*, 46 Vt. 200.

The defendant paid into court, under the rule, after this suit

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was brought, two hundred dollars to cover the amount which he conceded the plaintiff was entitled to recover, and his costs of suit, to the time of the payment. If the defendant is allowed to reduce the amount due from him to the plaintiff for the press and power attachment with chain-belt, by the amount of the damages which we hold he is entitled to for the plaintiff's failure to perform his part of the contract, it is conceded that the sum thus paid into court is sufficient to cover the balance due the plaintiff and his costs of suit to the time of such payment into court. On this state of the law and facts, the plaintiff is entitled to the sum paid into court as tender of amends and costs in this suit, and the defendant is entitled to recover his costs since the time of such payment.

The judgment of the County Court is reversed, and judgment is rendered that the plaintiff is entitled to the two hundred dollars paid by the defendant into court, and for the defendant to recover his costs since such payment.



OTIS CHAMBERLIN v. HENRY ESTEY AND OTHERS.

[IN CHANCERY.]

*Trust. Ward. Statute of Limitations. Insane Person.
Costs. Cross-Bill.*

The orator was trustee under a deed of trust, acting from 1865 to 1880. He boarded his ward, who was *non compos mentis*, acted as his guardian, though not legally appointed, and owed him a note of \$800, given in 1864, which was not a part of the trust property. The trust property consisted of real estate, which, on the death of the beneficiary, if he left no children, was to be divided between the heirs of the grantor, the trustee being one of them. The beneficiary having deceased, in settlement of the administration in a Court of Chancery between the trustee and the other heirs, *Held*,

1. The trustee can not plead the Statute of Limitations as a bar to the note he owed his ward.

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2. Nothing more than the income of the trust property could be appropriated to the support of the ward until his other property was used up.
3. The annual balance of the trustee's appropriations in behalf of his ward above the income of the trust property the law will apply on said note.
4. Having come into a court of equity the trustee took with him all the incidents of his relations as individual debtor, guardian, &c.
5. *Costs.* A trustee having acted honestly, coming into court to render his account is entitled to his costs, and sometimes his attorney fees ; but the orator sought to avoid his own debt, and omitted to give credits which he could have stated, and thus put the defendants to expense to prove them, the Supreme Court refused to reverse the decision below, allowing neither party costs.*
6. R. L. s. 7, "insane person, *non compos*" ; s. 968, Statute of Limitations does not apply to insane,—construed.

BILL in Chancery. Heard on bill, answers, replication, cross-bill, and master's report, December Term, 1882. TAFT, Chancellor, decreed that there was due the orator in respect to the trust account \$1,087.76 ; that there was due him on the account that accrued before the death of the ward's father \$183.46 ; that there was due from the orator to the ward's estate on the note specified in the report \$2,080.40 ; that the balance due the ward's estate was \$809.18 ; that the orator pay this amount to the ward's administrator ; and that commissioners be appointed to partition the trust estate. The trust property was certain real estate in Pomfret. The orator and his ward were brothers ; Laban Chamberlin, the grantor of the trust deed, was their father ; the orator and defendant Estey, the trustees ; and the orator and the other defendants were the heirs of said grantor. The ward was *non compos mentis*. Said Estey did not act. The trust commenced in 1865, and terminated in 1880, on the decease of the ward. The following is a part of the trust deed :

"To have and to hold to the said Otis and Henry, their heirs and assigns, to and for the uses following, viz. : to the use of my son Dennis Chamberlin during his natural life, and in case he, the said Dennis, should marry a wife, then to his children if any there should be, to their own use and behoof forever, and if he the said Dennis should leave no children, then after his decease and a decent burial, whatever remains of said several pieces of land if any, to be equally divided between my children, Otis, Mary Ann and Alonzo L., and their heirs and assigns, to them and their own use and behoof forever."

The bill prayed substantially :

That an account may be taken of the amount and value of the board and care furnished and bestowed by the said Otis, as such trustee, to and

* As to costs, see *Ricker v. Clark*, 54 Vt. 300 ; *Joslyn v. Partin*, 1b. 676.—REP.

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for said Dennis, and the amount paid for necessities for him, and for the other matters, as aforesaid; that said trust lands have become so incorporated with said Otis' lands that they cannot conveniently be separated or divided, and he prays that the value of the same may be ascertained in such way as this honorable court shall direct; and that if such value is not found to exceed the amount of said Otis' claim as such trustee, that the absolute title to the same may be confirmed to said Otis; or, if such value shall be found to be greater than the amount of said claim, that the said Otis may be permitted to pay to the heirs of said Alonzo L., their just proportion of such excess in value, and that the absolute title to said lands may thereupon be confirmed to the said Otis, and that the said defendant may be decreed to deed, by way of quit-claim deed or deeds, duly executed, to the said Otis, all right, title and interest in them, or either or any of them in and to said lands, which they have or can or may have, under and by virtue of said trust deeds, and that the absolute title to said lands may be decreed to said Otis and his heirs.

Defendant Estey did not appear. The other defendants answered and filed a cross-bill. In this they claimed that the orator owed the ward an \$800 note, given March 1st, 1864; that the income of the trust property was sufficient to support the ward; but if not, that the balance should be applied on the note; and prayed for partition of the trust property. The orator claimed in his answer to the cross-bill that the Statute of Limitations was a bar to the note. The master allowed the orator for boarding &c., his ward after he assumed the trust, \$1,087.76; account before he assumed the trust, \$183.46; the note due the ward's estate, \$2,080.40.

The master reported, in part:

"The principal controversy before the master was as to how much the said Otis should be charged for the use of said trust property, and as to how much he should be allowed for the board and care of the said Dennis."

"The master finds that the said Dennis at the time of the date of said note and ever afterwards was a person entirely incapable and unfit to have the care of his pecuniary affairs; that this was well known to the said Laban and to the said Otis; that the said Otis assisted his father in the care and control of the said Dennis, and after the death of his father took the entire care and control of the said Dennis and of his property, and acted as trustee and guardian of the said Dennis from the death of the said Laban to the death of the said Dennis; that it was the desire of the said Laban that after his death the said Otis should take the charge and control of the said Dennis and of his property. This the master infers from said deeds. That such arrangement was considered preferable to the legal appointment of a guardian for the said Dennis; that the said Otis did take and accept such trust and acted as such trustee and guardian from the death of said Laban so long as said Dennis lived; that this guardianship was assumed and maintained by the said Otis

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without appointment or authority from any court, and the said Dennis acquiesced in such assumed guardianship."

"The master being governed by the findings aforesaid, and taking into consideration the accounts, board and care and use of trust property, each year by itself strikes yearly balances and casts simple interest on such balances up to the first day of December, 1882, and finds and reports that there is due the said Otis in respect to said matters last aforesaid the sum of," &c.

It appeared that an administrator and commissioners had been appointed on the estate of said Dennis; that the administrator had been made a party to this proceeding; that the orator presented an account that accrued before his appointment as trustee to said commissioners; that the administrator presented in offset the said \$800 note; that the commissioners found a large balance against the orator; that their report was accepted by the Probate Court, and judgment rendered thereon; that the orator took an appeal, and the appeal was now pending; and that the effect of the Statute of Limitations on the note was submitted by the master to the court. The other facts are stated in the opinion.

William E. Johnson, for the defendants.

The trust property cannot be appropriated until the trustee has fully paid his own debt due Dennis' estate. Before the trustee can ask equity he must do equity. The note is not barred by the Statute of Limitations. 2 Story Eq. s. 1365. A *non compos* is an "insane person." R. L. s. 7. Section 968, R. L., prevents the statute from running in case a person is insane. And as the object of this provision of the act was to save the rights of those who have not legal capacity to protect them, those who are deprived of that capacity, from whatever cause it may arise, are included within its provisions. That provision of the act should evidently be liberally construed, and should include all cases that are within its spirit, as well as its letter. *Bliss v. C. & P. R. R. Co.*, 24 Vt. 425.

French & Southgate and *N. Paul*, for the orator.

This suit is brought to have the account of the trustee settled and adjusted. A Court of Chancery is the proper court. 1 Story Eq. s. 465. The master finds due the orator \$1,087.76 for board

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and care of Dennis, while he was trustee. We insist he is entitled to a decree to be paid out of the trust property for this: First, the note is in process of adjustment in a court of law; second, it is outlawed. The account having accrued, and the note having been given, before the deed of trust took effect, they should be adjusted in a court of law. The parties can have full and adequate remedy at law. The Statute of Limitations is pleadable in equity. 1 Story Eq. s. 529; Perry Trusts, s. 871; 12 Pet. 32, 56. The orator is entitled to his costs, including solicitor's fees. Hill Trustees, s. 552; *Moore v. Jones*, 23 Vt. 739; *R. R. Co. v. Miller*, 47 Vt. 146.

The opinion of the court was delivered by

VEAZEY, J. As Dennis Chamberlin had property of his own, consisting of a debt of \$800 due from the trustee Otis Chamberlin, and evidenced by a promissory note, he was not entitled under the trust deed to have anything more than the income of the trust property appropriated to his use until his own estate was used up in his support. Therefore, there being sufficient practically in the hands of the trustee Otis to meet all his demands for Dennis' support and care, Otis is not entitled to have the amount which the master has found he has appropriated for this purpose, in addition to the income of the trust property, made a charge thereon. The trustee entered upon his trust in 1865, and continued therein until the decease of Dennis in October, 1880. During all this time he was owing said note of \$800 to Dennis, upon which no payments have been made. Dennis being, as the master finds, "considerably deaf, with an intellect so weak and feeble that he was unable to learn to read writing, . . . and entirely incapable and unfit to have charge of his pecuniary affairs," was *non compos mentis*, and Otis, his brother, though not appointed, yet acted as his guardian. Dennis being under this disability the Statute of Limitations would not run against him. Sections 7 and 968, R. L. But, independent of the exception in the statute as to persons *non compos*, Otis being the trustee and guardian, and throughout this trust and guardianship owing said note to Dennis, could not have the benefit in this proceeding of the Statute of Lim-

itations. As between trustee and *cestui que trust*, in the case of an express trust, the Statute of Limitations has no application, and no length of time is a bar. Perry on Trusts, section 863, and cases cited. Although Otis was not trustee of this note, that is, although there was strictly no express trust as to it, yet Otis having assumed to act as Dennis' guardian generally, he owed a duty to his ward as to this note. Chancery will always exercise great diligence in protecting the interests of wards, and especially when those interests come in conflict with those of the guardian. It would be gross inequity to allow Otis to plead the Statute of Limitations to his note due his *non compos* ward, in this proceeding, when, during the life of the note, he had a constantly accruing claim in his own favor against the ward.

We think the trustee had the right to come into a Court of Chancery to render and settle his account. It is peculiarly the province of that court to administer and adjudge in such matters. He had not acted as trustee or guardian by appointment of the Probate Court, and was not before that court as trustee in a regular proceeding to settle his trust account. But having resorted to a court of equity to settle and discharge his trust, he necessarily took with him all the incidents of his relations, individual as well as official, to the trust estate. He invoked the utmost scrutiny of the court to his relation as individual debtor of the ward as well as to his acts of administration. He at the same time held three relations to Dennis, that of debtor, of guardian, and of trustee under the deed.

If Otis had known exactly what the annual balance of his appropriations in behalf of Dennis, above the income of the trust property was, it would have been his duty to apply such balance annually on said note. He had the use of the trust property and boarded Dennis in his family, but had no right to fix the value of such use or the price of such board; therefore, he could not tell what to apply on the note. These values having been determined by the master and the annual balances found, the law will make the application just as parties competent to treat with each other could have made it, and as it would have been the duty of Otis to make it, if he had known the amount, to apply. Both parties

complain of the decree below as to costs, which were allowed to neither party. There is no controversy as to the general rule that when a trustee, who has acted honestly and in good faith, comes into court to render his account, he is entitled to his costs and sometimes even his attorney fees. Each party invokes this rule in support of the respective complaints as to the decree in respect to costs. The defendants make no complaint as to the orator's administration of the trust, but do complain because he sought to make the amount due him, independent of the amount he owed Dennis, a charge upon the trust property and to avoid his own debt, and omitted to give many credits which he could have stated, and thus put the defendants to expense to prove them. We think there was enough of this to warrant the chancellor in denying the orator costs.

The general rules as to costs in cases of this kind are well defined, but it is not often that any one of them so exactly applies to a particular case as to be controlling. No two cases are alike. The application of the rules must rest in the sound judgment of the court in view of all the facts and circumstances of the case. Trustees differ almost indefinitely in degrees of honesty and capacity. Administrations vary in difficulty to very great extent. An omission or neglect culpable in one case might be excusable in another. Very much wrong conduct by persons in positions of trust is inadvertent, arising from lack of knowledge of duty or bad advice, or misapprehension of facts.

Looking at this case as a whole and all its features, we are inclined to think that it was a proper one for a division of costs, and that the decree of the chancellor should not be disturbed in that respect.

The decree of the Court of Chancery is reversed, and the cause remanded with a mandate pursuant to the foregoing views.

GEORGE GREGG v. TOWN OF WEATHERSFIELD.

Consideration. Vote of Town. Compromise.

In an action of assumpsit based on a vote of the town, where the plaintiff offered to prove that he was injured while travelling on the highway through its insufficiency; that he gave notice of his injuries, in proper form, within *thirty* days, instead of *twenty*; that he was misled respecting the time within which such notice should be given by information given him, on which he relied, by one of the selectmen of the town; that at a legally warned meeting of the voters of the town, the plaintiff presented his claim for damages, insisting that the defendant could not take advantage of the defect in the notice, and that thereupon the town voted to pay him \$200; which offer of evidence was rejected by the court below, and a verdict ordered for the defendant. *Held*, that defendant was not responsible for the misinformation given by one of its selectmen; that the vote was not a compromise, as there was no mutual yielding of opposing claims; and no consideration for the vote.

ASSUMPSIT. Plea, general issue. Trial by jury, December Term, 1882, TAFT, J., presiding. Verdict ordered for the defendant. The case is stated in the opinion.

Gilbert A. Davis, for the plaintiff.

A corporation has power to settle disputed claims against it. 1 Dillon Corp. s. 477; *Bean v. Jay*, 23 Me. 117; 14 Ill. 193; 7 Pick. 18; 9 Pick. 298; 14 Johns. 330. In *Hanover v. Eaton*, 3 N. H. 32, it was held that the selectmen acting as overseers may bind their town not to take advantage of a defect in a notice respecting a pauper. Same principle held in *Embeden v. Augusta*, 12 Mass. 307; 16 Mass. 102; *Augusta v. Leadbeater*, 16 Me. 48.

The compromise of a disputed claim *fairly made* is a good consideration for a promise, and it makes no difference should it ultimately appear that the claim was wholly without foundation. *Alis v. Billings*, 2 Cush. 21; *Ormsbee v. Howe*, 54 Vt. 186; *Blake v. Peck*, 11 Vt. 483; *Morgan v. Adams*, 37 Vt. 233; *Russell v. Cook*, 3 Hill, 204; *Costar v. Brush*, 25 Wend. 628; *Steele v.*

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White, 2 478; *Paige*, *Logridge v. Dorville*, 5 B. & Ald. 117; *Cross v. Richardson*, 30 Vt. 641; *Booth v. Fitzpatrick*, 36 Vt. 681.

W. M. Pingry and *W. E. Johnson*, for the plaintiff.

The liability of towns for injury arises from statute and not the common law. *Baxter v. Winooski Turnpike Co.*, 22 Vt. 123; *Hyde v. Jamaica*, 27 Vt. 443; *Kent v. Lincoln*, 32 Vt. 595. The question then arises, Can the town vote money to an individual who has no claim? The only purposes for which towns can vote a tax and appropriate money are as set forth in section 2751, R. L.; for the support of the poor, for laying out and repairing highways, for the prosecution and defence of the common rights and interests of the inhabitants, and for other incidental town expenses. Under these provisions it has been held in *Drew v. Davis, et al.*, 10 Vt. 506, that a town could not lay a tax and appropriate money to build a jail. *Wheelock v. Hardwick*, 48 Vt. 19; *Underhill v. Washington*, 46 Vt. 772.

The opinion of the court was delivered by

POWERS, J. The plaintiff offered evidence tending to prove that, without fault on his part, he had suffered damage by reason of the insufficiency of a highway in the defendant town, which the town was bound by law to keep in repair; that he gave a written notice of such injury to the town, proper in form, within thirty days of the happening of the accident, but not within twenty days as the law requires; and that he was misled respecting the time within which such notice should be given by information given him, on which he relied, by one of the selectmen of the defendant town; that under these circumstances, a legal meeting of the voters of the defendant town was warned and holden, at which the plaintiff presented his claim for damages for the injuries aforesaid, and insisted that the town could not take advantage of the defect in the notice, and thereupon the town voted to pay him the sum of \$200, but had refused to give him an order or otherwise pay said sum.

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This action is predicated upon said vote and not upon the original cause of action ; and it is argued on the one hand that the promise is wholly without consideration inasmuch as the failure to give seasonable notice of the injury wholly invalidated the plaintiff's right of action ; and on the other, that the promise to pay was a compromise of a doubtful claim, and therefore rested on good consideration. The misinformation of one of the selectmen was not a statement or declaration for which the town is responsible. It was the act of the minority of the board and not within the scope of official duty.

The plaintiff has now the same right to bring suit upon his original claim that he had before said vote was passed. He has done, or omitted to do, nothing that bars his right. He has parted with nothing of value, suffered no detriment nor forborne the exercise of any right, by reason of said vote. A compromise imports a mutual yielding of opposing claims, the surrender of some right or claimed right in consideration of a like surrender of some counter claim. If the right surrendered is of doubtful validity, or indeed of no validity at all, its surrender may be a valuable consideration for a promise. But something more must be shown than the mere existence of the claim. The plaintiff does not say in his proposed evidence that he forbore to sue his claim, relying on the defendant's promise to pay. Waiving the question of the power of a town to pay out money upon invalid claims of this character—a question we do not decide—the plaintiff would have stated a cause of action if he had offered evidence that he forbore to take contemplated legal proceedings to enforce his claim by reason of the action of the town. Says COCKBURN, Ch. J., in *Callisher v. Bischoffaheim*, L. R. 5 Q. B. 449 : “ The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect to such claim is a good consideration, and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the plaintiff *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration.” The proposed evidence disclosed no consideration for the vote.

The judgment is affirmed.

Atherton v. Fullam.

SOLON I. ATHERTON, ADMR. OF IRA MATTHEWSON'S
ESTATE, v. VOLNEY S. FULLAM, EXR.

1. The defendant's testator was surety on a probate bond. The principal on the bond appealed from the decree of the Probate Court fixing the amount of his liability. The County Court heard the case, rendered judgment, returned a certificate to the Probate Court, where a final decree was made. The principal had been removed, and the plaintiff appointed administrator *de bonis non*; the surety had deceased, and the defendant was his executor. *Held*, that the claim upon the bond did not become absolute until the last decree of the Probate Court; and that, the time having expired for presenting claims to commissioners, the plaintiff, under the statute, R. L. s. 2208, having presented it to the executor within one year from the time of the final decree, in an action on the bond, is entitled to recover.
2. R. L. s. 2208, administrator to pay certain claims if they are presented within one year after becoming absolute—construed.

DEBT on a decree of the Probate Court. Heard on demurrer to the declaration, December Term, 1882, TAFT, J., presiding. Demurrer overruled.

The declaration alleged that the plaintiff was administrator *de bonis non* of the estate of Ira Matthewson; that on the 18th day of May, 1869, one Sylvanus O. Matthewson had been appointed administrator of said estate; that he continued to act as such until about the 27th day of October, 1877, when he was removed, and the plaintiff appointed in his place; that the defendant's testator, Sewell Fullam, was surety on the bond given by said Sylvanus O. to the Probate Court; that on the 30th day of November, 1878, the Probate Court, having examined the account of said Sylvanus O. and found that he had in his possession \$838.46 belonging to said estate, decreed that he pay that amount to the plaintiff; that said Sylvanus O. appealed to the County Court, May Term, 1879; that the cause was continued to the December Term, 1879, when by agreement it was referred; that the report was returned to, and judgment rendered by, the County Court, December Term, 1880, for the plaintiff to recover \$350.27, with costs, and that the judgment be certified to the Probate Court; that a certificate was sent to the Probate Court, April 22d, 1881; that the Probate Court, December 5th, 1881, decreed that said Sylvanus O. should pay to the plaintiff \$350.27, with interest, &c.;

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that the plaintiff demanded of said Sylvanus O. said sum of money, August 28th, 1882, and afterwards demanded the same of the defendant; that the said Sewell Fullam deceased day of December, 1876; that the defendant was duly appointed the executor of his will, January 23d, 1877, and that commissioners were also appointed on that day to receive and adjust claims against his estate, and six months given to present such claims; that on the 22d day of August, 1881, the plaintiff presented the bond to the Probate Court as a contingent claim against the estate of said Sewell Fullam.

W. W. Stickney and M. H. Goddard, for the plaintiff.

Hunton & Stickney, for the defendant.

The opinion of the court was delivered by

ROWELL, J. Was the claim in suit presented to the defendant, executor as aforesaid, "within one year after it accrued"? R. L. s. 2208. That is the question.

In support of the demurrer it is contended that the judgment of the County Court might have been carried into effect by an execution issuing out of that court, and that, therefore, the claim became absolute upon the rendition of that judgment, and that the certificate to the Probate Court was nugatory. On the contrary it is contended that the claim did not become absolute till December 5, 1881, when the Probate Court made an order and decree in accordance with the judgment of the County Court.

The statute provides that the final decision and judgment of the County Court or the Supreme Court in probate appeals, "shall be certified to the Probate Court"; and that "the same proceedings shall be had in the Probate Court as though such decision had been made in such court." R. L. s. 2283. We think this statute is imperative. To send down a certificate has always been the practice, as far as the members of the court know or have ever understood; and we think it the general understanding of the Profession that it must be done. Probate appeals are very analogous to chancery appeals, in which the statute provides that when the appeal has been heard and determined, the proceedings, with the judgment, de-

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cree, or order of the Supreme Court, and all things concerning the same, shall be remanded to the Court of Chancery, where such proceedings shall be had as may be necessary to carry such judgment, etc., into effect. R. L. s. 775.

The certificate is required in probate appeals, that the Probate Court, where the estate is in process of settlement, may have authentic information of the decision above, to the end that it may conform its subsequent action in the premises thereto. *Green v. Clark*, 24 Vt. 136. And when such subsequent final action is there taken, and not till then, the matter is finally disposed of in that court. So in this case. Matthewson was in no legal default until he neglected and refused to comply with the order and decree of the Probate Court of December 5, 1881. His liability did not become finally fixed until then, nor the claim upon the bond absolute.

Affirmed and remanded.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTY OF FRANKLIN,
AT THE
JANUARY TERM, 1883.

PRESENT :

| | | |
|---|---|-------------------|
| HON. TIMOTHY P. REDFIELD, HON. JONATHAN ROSS, HON. WHELOCK G. VEAZEY, HON. JOHN W. ROWELL, | } | ASSISTANT JUDGES. |
|---|---|-------------------|

O. F. BELLOWS v. E. A. SOWLES.

Consideration. Compromise. New Trial.

The plaintiff was heir-at-law of the defendant's testator, but received nothing under the will. The defendant was executor, and his wife and daughter legatees. The plaintiff claimed that he had determined to contest the will on the ground that it had been obtained by undue influence, that he had given notice of his intention to the Probate Court, that he had employed counsel, and had been advised by him to make opposition; that this was known to the defendant; that the defendant promised to pay the plaintiff \$5000 if he would desist in such opposition; that the plaintiff, in consideration of such promise, did forbear; and that the will was approved without delay. *Held*, in an action to recover the five thousand dollars,

1. The plaintiff was neither bound to allege, nor prove, that undue influence had been used to procure the making of the will.
2. But the consideration was sufficient if he was able to show that he honestly thought he had good and reasonable ground for making the claim that the will, so far as

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it related to him, was the production of undue influence, and for that reason he *honestly and in good faith intended* to oppose its establishment.

3. A doubtful right compromised, to be a good consideration for a promise, must upon reasonable grounds be honestly entertained. There must be a yielding of something by each party.
4. A new trial was denied on the ground that the alleged matter, if established, the court could not say, would change the result.

ASSUMPSIT, with two special counts and common counts. Pleas, the general issue, special pleas in bar, and notice of special matters in defence. Trial by jury, September Term, 1880, ROYCE, J., presiding. Verdict for the plaintiff. The declaration alleged in substance:

That the plaintiff was a relative and heir-at-law of Hiram Bellows; that by the terms of the last will of said Bellows no allowance was made for the plaintiff; that the plaintiff claimed and insisted that he was left out of said will, and that no provision or allowance out of the estate was made for him through undue influence used upon said Bellows by said defendant and his wife, and that said will was void; that "whereas, the said defendant, being then and there the executor named in said will, and being largely interested personally in said estate, and as legatee and the husband of the principal legatee under that will, and well knowing the claims of the plaintiff, and that he had employed counsel as aforesaid, and that other heirs were then and there making similar claims, and being anxious to have said will sustained, had also employed counsel for that purpose, and it was then and there expected by the parties that a contest would be had upon the approval of said will, which would involve the expenditure of a large amount of money and hinder and delay the settlement of said Hiram Bellows' estate and the receipt by the said defendant and his said wife of their said legacies, and other sums of money which the defendant would otherwise receive.

"And the plaintiff avers that on, to wit, the 6th day of December, A. D. 1876, to wit, at St. Albans, aforesaid, the plaintiff met the defendant, by appointment, at his, defendant's, house, and then and there the matters and things above set forth were fully talked over and discussed, and then and there, in consideration of the premises, and that the said plaintiff, at the special instance and request of the said defendant, would see one Charlotte Law, who was an heir of said Hiram Bellows, and was then and there intending to contest the validity of said will, and would use his influence to have her allow said will to be approved, and that the plaintiff would forbear to contest the approval of said will of the said Hiram Bellows and allow the same to be approved by the Probate Court, aforesaid, and would not appeal from the decision of said court, he, the said defendant, undertook and then and there faithfully promised to pay the plaintiff the sum of five thousand dollars, whenever, after twenty days had elapsed from the date of the approval of said will by said Probate Court, he should be thereunto requested, to wit, at St. Albans, aforesaid. And the said plaintiff avers that, confiding in the promise and undertaking of the said defendant, so made, as aforesaid, afterwards, to wit, on the day and year aforesaid, he did see Charlotte Law, and did use his influence with her to allow said will to be approved, and did forbear to

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contest the approval of said will of the said Hiram Bellows, and did allow the same to be approved by said Probate Court, and did not appeal from said approval."

On trial it appeared that said Bellows died testate, on the 18th day of October, 1876; that his will was presented to the Probate Court on the 18th day of November, 1876, was probated on the 7th day of December, following, and no appeal taken from its allowance; that the plaintiff was a nephew and heir of said Bellows, and not a legatee; that the defendant was not an heir, but executor, and his wife and daughter were both legatees; and that the estate was worth between \$250,000 and \$300,000. There was no evidence in the case tending to show any want of capacity on the part of said Bellows to make a will, or to show that any ground of action existed for contesting the validity of the will, or that any doubt existed as to its validity, and no cause was shown why it should not have been admitted to probate, except the evidence of the plaintiff.

The plaintiff's evidence tended to show that shortly after the death of Mr. Bellows he learned what the provisions of the will were, that he determined to contest its probate; employed counsel who looked up the law and evidence of the case and advised plaintiff to contest it; that he gave the Probate Court notice of his intention to contest the will; and that on the sixth day of December, the day before the day set for the probate of the will, he came to St. Albans with counsel, for the purpose of contesting the will, and that on the evening of that day, upon the invitation of the defendant, he, in company with his brother James, went to defendant's house to talk over the matter; that they talked about contesting the will; that plaintiff said that he had come out to test the will; that he thought it was not a will Mr. Bellows ever made; that he thought it was got up by the defendant and his wife; that defendant replied, that was no use; that he had seen Judge Aldis, and that he had looked the will over and that it could not be broken; that plaintiff replied that his counsel told him that it could; that defendant then wanted to know what he wanted, and plaintiff said he ought to have ten thousand dollars; and defendant replied, that was too much; whereupon plaintiff said the Atwood boys got five thousand dollars each, and that he (plaintiff) was nearer to deceased than they, and that his counsel advised him not to take anything less than ten thousand dollars; that defendant said he wanted to get the matter straightened out as

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soon as he could, and if it was contested it was agoing to expose a great many things that he would rather be kept back ; that it was agoing to make taxes higher, and everything else ; that defendant then asked him if plaintiff would take five thousand dollars ; and that plaintiff then consulted with his brother privately, and concluded he had better accept than to go on and have a lawsuit about it ; and thereupon told defendant he would accept it ; that defendant said if he, plaintiff, would not appear to contest the will and would try to prevent others from doing it, he should have as much as that ; that he, plaintiff, proposed to put it in writing, but defendant said to him, "Do you doubt my word?" and plaintiff replied, "I don't doubt your word;" that plaintiff was not to enter an appeal from the allowance of the will ; that defendant agreed to pay the five thousand dollars as soon as he was satisfied that nobody appeared to contest the will, after the twenty days from its allowance had passed ; that plaintiff said he would take the offer ; that defendant asked plaintiff if he thought there were any others who were coming in to contest the will ; that plaintiff said he did not know of any others, except it was Charlotte Law ; that plaintiff said he would go and see her, and if she had a notion to come down and contest the will, he would try and persuade her not to, and the defendant said he thought that he, plaintiff, had better see her ; that Mrs. Law was a niece of said Hiram Bellows, and lived in Cambridge, Vt. ; that within three or four days, and before the twenty days had expired, he, the plaintiff, did see Mrs. Law and did use his influence with her not to contest the will, but he did not influence, or attempt to influence, anyone else in that respect. There was no evidence in the case that Mrs. Law ever designed or intended to contest the will, but on the contrary, Mrs. Law testified that she did not make any preparation to contest the will and that she thought she never designed to, and that plaintiff did not use his influence with her not to contest the will. The defendant's evidence, which was uncontradicted in this respect, showed that Mr. Bellows, at the time he drew up and executed his will, was a man of great firmness and decision of character, and not easily influenced by others ; that the will was composed and written by him, and was introduced in evidence ; that he, with his family, lived in the same family with said Bellows for twelve or thirteen years previous to the death of said Bellows ; and that no influence was ever had or attempted upon him in regard to his will.

The defendant filed a motion for a verdict :

(1.) Because said declaration does not allege that the plaintiff

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had been left out of the will through any undue influence; (2.) there is no evidence in the case tending to show that any undue influence had been used; (3.) there is no evidence in the case tending to show that any reasonable doubt existed as to the validity of the will; (4.) the evidence shows that plaintiff has no cause of action.

Motion overruled. The defendant requested the court to charge the jury:

First, that the statement of plaintiff, that defendant said to him his wife could wind Mr. Bellows round her fingers, is not to be considered by them as evidence tending to show that any undue influence had been used. Second, that if the jury find that Charlotte Law was not intending to contest the validity of the will, or that if plaintiff did not use his influence with her to have her allow said will to be approved, they should render a verdict for the defendant. Third, that there is no evidence in the case tending to show any just cause why the will should not have been admitted to probate as valid, nor that any doubt existed as to its validity, and that their verdict should be for the defendant. Fourth, that if the jury find that the plaintiff, as a reasonable, prudent and conscientious man, had no good ground to believe that any undue influence had been used, and had no good reason to doubt the validity of the will, then the verdict should be for the defendant.

The court refused the requests. After verdict the defendant filed a motion in arrest. The reasons given were nearly like those in the motion for a verdict. Motion overruled. The defendant then moved to set aside the verdict and for a new trial, on the ground that one of the jurymen was an alien. This motion was tried by the court, and the court found that he was a citizen. Questions arose as to the admission of certain evidence on this motion; but it is not necessary to state them, as they were not decided by the court.

Edson, Start & Cross and L. P. Poland, for the defendant.

The court should have ordered a verdict for the defendant. The declaration must allege that there was a debt due, or a probable ground to enforce a well-founded claim between the parties in law or equity forborne, or there must be a compromise of a doubtful claim or right. *Busby v. Conway*, 8 Md. 55; *Mulcho-*

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land v. Bartlett, 74 Ill. 58; *Jones v. Ashburnham*, 4 East, 455, 463; 1 Parsons Con. 465-467; *Allen v. Proper*, 35 Ala. 173; Abb. Tr. Ev. 815; 47 N. H. 294. Forbearance must be absolute and binding on both parties. 1 Hilliard Con. 256. The declaration does not aver, nor the proof tend to show, that Charlotte Law ever had any intention to contest the will, but her evidence shows the contrary. For the want of such averments and proofs, the consideration of plaintiff's alleged promise fails. *Wade v. Simeon*, 52 E. O. L. 564; 4 East, 363; *Edwards v. Baugh*, 11 M. & W. 639; *Prater v. Miller*, 25 Ala. 320; *Stewart v. Bradford*, 26 Ala. 410; *Ecker v. Buha*, 45 Md. 278; *Jarvis v. Sutton*, 3 Ind. 289; *Martin v. Black*, 20 Ala. 307. The case shows that defendant had no interest, either as heir or legatee of Hiram Bellows; therefore a promise by him to pay a sum of money for the forbearance of plaintiff to contest the will is wholly without consideration. *Holt v. Robinson*, 21 Ala. 111; *Busby v. Conway*, 8 Md. 55; *Seamon v. Seamon*, 12 Wend. 381; 5 Allen, 473; *Smith v. Rogers' Est.* 35 Vt. 140; 44 N. Y. 648; *Sullivan v. Collins*, 18 Iowa, 228; 1 Parsons Con. 366; Chit. Con. 33, 41, n. m. Where no consideration is stated, or an insufficient one is alleged, the defendant may demur or move in arrest, or move for a verdict. 1 Chit. Pl. 298; *Needham v. McAuly*, 13 Vt. 68; *Edwards v. Baugh*, 11 M. & W. 639; *Vadaken v. Soper*, 1 Aik. 287; *Dolcher v. Fry*, 37 Barb. 152; *Busby v. Conway*, 8 Md. 55; *Goodenough v. Huff*, 53 Vt. 482. The evidence tended to show that plaintiff had no just claim in law or equity upon which to contest the will, and a promise to forbear to make such contest by one person, will not be enforced for want of consideration. 1 Parsons Con. 365; Chit. Con. 33, 43, 44; Hilliard Con. 266, s. 20.

Wilson & Hall, G. A. Ballard, Noble & Smith and Farrington & Post, for the plaintiff.

The declaration sets out a good cause of action, and the evidence supports it. 1 Chit. Pl. 673-679; *Battles v. Braintree*, 14 Vt. 348; *Curtis v. Burdick*, 48 Vt. 166; *Closson v. Staples*,

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42 Vt. 226; 49 Vt. 17. There was a valid consideration for the promise. The agreement not to oppose the probate of the will, nor to appeal from its allowance, was a waiver of a legal right. *Baylies v. Payson*, 5 Allen, 473; *Downer v. Church*, 44 N. Y. 648; *Smith v. Estate of Rogers*, 35 Vt. 140; *Templeton v. Bascomb*, 83 Vt. 133; *Hammond v. Cook*, 25 Vt. 297; *Blake v. Peck*, 11 Vt. 483; *Seaman v. Seaman*, 12 Wend. 381; 4 Ill. 203. The jury have found from the evidence, under the charge of the court, that the plaintiff did see Charlotte Law, and did use his influence to prevent her contesting the will. This is also a sufficient consideration. *Kerr v. Lucas*, 1 Allen, 279; *Sanborn v. French*, 22 N. H. 246-248; *Whittle v. Skinner*, 23 Vt. 531; *Oakley v. Boorman*, 21 Wend. 588. No question of variance can be raised here. R. L. s. 1391; 49 Vt. 304. The defendant is liable upon his promise. 3 Redf. Wills, 320; 1 Wait Act. & Def. 96, 97; Parsons Con. 438-440; *Dolcher v. Fry*, 37 Barb. 152; *Russell v. Cook*, 3 Hill, 504; *Dixon v. Evans*, 5 Eng. & Irish App. Cases, 606; *White v. Hoyt*, 23 N. Y. 514.

The opinion of the court was delivered by

Ross, J. The exceptions taken on the trial, as well in regard to the defendant's motion for a verdict, as in regard to the refusal of the court to charge as requested, relate mainly to the subject of the consideration for the defendant's promise. This subject, and the particular phase of it involved in this case, was under consideration in *Ormsbee v. Howe*, 54 Vt. 182. It is there said: "The compromise of a doubtful right is a sufficient consideration for a promise, and it does not matter on whose side the right ultimately turns out to be." The soundness of this proposition is not fairly open for debate. It is elementary. The plaintiff was heir at law of Hiram Bellows. He was interested in whatever disposition he made of his property. He had the right to oppose the establishment of any will made by him when offered for probate. Not being a legatee or devisee in the will of Hiram Bellows, it was for the plaintiff's interest to prevent the establishment of the will. The defendant was named executor in the will, and

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his wife and daughter were special legatees, and his wife the residuary legatee. He was, therefore, interested in the establishment of the will. Hence, if the plaintiff had any reasonable, *bona-fide* ground to oppose the establishment of the will, and forbore to exercise such right at the request, and because of the promise of the defendant, such promise would be founded upon a good consideration. There was evidence tending to show such forbearance and promise. By such forbearance the defendant gained what was of value to him, the establishment of the will without delay or opposition, and at less expense, and the plaintiff lost what might be of value to him, the opportunity to oppose its establishment, either of which was a good consideration for the promise. It was not necessary for the plaintiff to allege and prove that his ground of opposition to the will would have been found sufficient to have defeated its establishment. It was enough if he had an honest, reasonable ground of opposition and intended to use it, and forbore to do so on account of the defendant's promise. Hence the defendant was not entitled to have his motion to have a verdict ordered by the court in his favor complied with. The plaintiff was neither bound to allege nor prove that undue influence had been used to procure the making of the will. But he was, when that was brought in question, bound to show that he honestly thought he had good and reasonable ground for making the claim that the will so far as it related to him was the production of undue influence, and for that reason he honestly intended to oppose its establishment. Whether the plaintiff acting as a reasonable, prudent and conscientious man, had good ground to believe undue influence had been used, and for that cause he had good reason to doubt the validity of the will, and therefore honestly proposed to oppose its establishment, or whether he had no good ground to believe undue influence had been used, and so had no good reason to doubt the validity of the will, and dishonestly put the same forth as a ground of opposition to the establishment of the will, makes a very material difference in regard to the consideration his action would afford to support the defendant's promise to pay him five thousand dollars for forbearing to oppose the establishment of the will. On the first sup-

position his forbearance would be the yielding of a right which he honestly upon reasonable grounds supposed existed and intended to assert, and would furnish ample consideration for the defendant's promise. On the latter hypothesis, his opposition to the will was dishonest, unfounded, factitious, and set up to extort money from the defendant. In short, his opposition to the will, if successful, would be a blackmailing operation. There is no essential conflict in the authorities produced by the parties on this subject. Cases can be found where no claim is made but that the compromised right was an honest one, honestly entertained and asserted, and in which no reference is made to the *bona-fide* character of the transaction. The doubtful right compromised, to be a good consideration for a promise, must upon reasonable grounds be honestly entertained by the person proposing to assert it. It is neither necessary to allege nor prove that the right actually existed. The case of *Ormsbee v. Howe, supra*, is in point. If money has been actually paid in compromise of a false and fraudulent claim dishonestly made and asserted, it may be recovered back as held in *Hoyt v. Dewey*, 50 Vt. 465. Upon these views of the law the defendant's first and third requests were properly refused; but his fourth request should have been substantially complied with. It is, however, claimed that if the plaintiff yielded no right, the defendant gained by the compromise in that he avoided delay and expense in the establishment of the will, and for this reason he should be held to perform his promise. But if the plaintiff's opposition to the establishment of the will was fraudulent and put forth to extort money, he would not only yield nothing, but the defendant would gain nothing, by the compromise; that is, there would be no compromise, because nothing on one side of it. A compromise is the yielding of something by each of two parties, and can only exist when something is yielded by each party to it. Besides, *fraud* in the foundation of a claim permeates the whole superstructure, taints and vitiates the entire transaction. *Ormsbee v. Howe, supra*. It is probable the plaintiff in such a case would be liable for whatever expense he should cause the defendant by the dishonest assertion of a false claim to extort money. *Hoyt v. Dewey, supra*. The defendant's motion

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in arrest of judgment, on these views, was properly overruled.

The other questions arising on the motion for a new trial in regard to the disqualification of the juror Hibbard, will never arise again probably in the new trial of this case, and need not be considered. It presents some nice questions in regard to presumptions which are not altogether free from difficulty. On the exceptions the judgment of the County Court is reversed, and cause remanded for a new trial.

The petition for a new trial is not sustained. The alleged matter is so far collateral to the main issue that the court cannot say it would, if established, avail to change the result if a new trial should be granted thereon. The same is dismissed with costs to the petitionee.

A. P. POND v. LUTHER BAKER, AND OTHERS.

Attachment. Return, Amendment of. Sheriff. Lessor.

1. In making an attachment the copy left in the town clerk's office must describe the property with reasonable certainty, such as will inform the debtor, and those with whom he may deal, that it is attached.
2. The return on the copy left with a lessee, or town clerk, in order to create a valid attachment of the property of a lessor, must contain a specific description of the property attached.
3. When an officer is a party justifying under his official acts his return is evidence; but where the return only shows that a *list of the property* was indorsed, it was properly excluded.
4. The Supreme Court remanded, on motion, the cause to give an opportunity to amend the officer's return.
5. B. L. ss. 1190, officer's return, and 876, attachment by copy left in the town clerk's office, construed.

TRESPASS with count in trover. Pled, not guilty; and trial by jury, April Term, 1882, ROYCE, Ch. J., presiding. Verdict

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ordered for the defendant. The following is a copy, in part, of the officer's return :

"I then served this writ by attaching as the property of the within named defendant all the real estate in the town of Montgomery. And on the same day I attached all the hay, grain in the straw, corn, corn in the cob and in the stalk, potatoes in the cellar, and implements for the manufacture of maple sugar, in the house, barns, sheds, cellars, and other buildings on the farms, lands and premises owned and occupied, and or occupied by the within named defendant, or occupied by one G. M. Campbell, or by any other person as tenant to the or claiming to be tenants to him, the said defendant, situated in Montgomery aforesaid. And I also on the same day attached all the neat cattle, horses, hogs and sheep, cows, oxen, young cattle, &c., . . . now on or kept on the said farms, lands and premises, or any part thereof by the said defendant, the said G. M. Campbell, or any other person. And on the same day I gave the said defendant and also the said G. M. Campbell, lessee, and all other persons to the occupancy of said farm lands and premises immediate and personal notice of said attachment. I also on the same day attached three double wagons, two one and two horse wagons, two pair traverse sleds, two pair double harnesses, one single harness, one horse-power and thresher, saw, . . . one single sleigh, two mowing machines, one horse rake, one tedder, five plows, three drags, one grindstone, all of which personal property I found in the hands and possession of said G. M. Campbell, who claims to hold the same as lessee of the said defendant. And on the same day I delivered to the said G. M. Campbell a true and attested copy of this writ of attachment *with a list of the property so attached thereon endorsed*. And on the same day I lodged in the office of the town clerk of said town a true and attested copy of this writ *with a list of the property so attached thereon endorsed*."

The property was attached on a writ against John Campbell. G. M. Campbell was his lessee and had possession of this property except the young cattle. The other facts are stated in the opinion.

H. E. Rustedt and H. C. Adams, for the plaintiff.

E. H. Powell, for the defendants.

The opinion of the court was delivered by

VEAZEY, J. This is an action of trespass with a count in trover to recover for farm stock and other personal property. The plaintiff claimed to have attached the property as deputy sheriff on a writ of attachment in favor of one Wilkins against one Campbell, and that after his said attachment the defendants in this suit took and disposed of the property, and this suit is

brought for the damages. The plaintiff's right depends on the validity of said attachment. To show that he offered in evidence a certified copy of the writ and return thereon,—*Wilkins v. Campbell*. The defendant objected to the admission of the return, and the court excluded it. The plaintiff then offered certain other evidence which the court excluded, and ordered a verdict for the defendants. The bill of exceptions does not show that any exception was taken to the exclusion of any of this evidence; but the case has been argued as though there were such an exception; and the question argued has been as to the sufficiency of the return to constitute an attachment lien. The defendants claim that the return does not show that the property described therein was attached as the property of the defendant Campbell; also that it does not describe the property sufficiently to create an attachment; also that the alleged attachment created no lien because the return does not show that the copies left with the lessee in whose hands the property was found, and the copy left at the town clerk's office, had the return endorsed thereon as provided by statute. Independent of statutory regulation, the law requires an officer to give as nearly as he reasonably can in his return, or in the schedule or inventory annexed thereto, a specific description of the articles attached, their quantity, size and number, and any other circumstances proper to ascertain their identity. *Drake on Attachments*, s. 208, and cases cited. In case of attachment by copy left at the town clerk's office the property must be described with reasonable certainty,—no more is required. It must be sufficiently pointed out to enable the debtor, and those with whom he may deal, to be informed that it is attached. *Bucklin v. Crampton*, 20 Vt. 261. Reasonable intendments are made in favor of officers' returns. The presumption of law is in favor of the legality of returns. *Drake v. Mooney*, 31 Vt. 619. A valid lien is created by attachment by copy in town clerk's office when the return is sufficiently precise to show the identity of property attached. *Fullam v. Strauss*, 30 Vt. 443. The above indicates that a fairly liberal rule has been adopted in Vermont, in the construction of officers' returns; but will the return in question stand the test indicated, so far as pertains to the description? We put the inquiry, not to

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be here answered, as there is another fatal defect, but in order that silence may not be construed as an approval of such looseness in returns. There is in fact grave doubt whether the return in this respect is sufficient as to all the property to create an attachment.

As to the other defect: the statute provides that personal property held by a lessee may be attached as the property of the lessor, and a valid lien created by delivering to the lessee a true and attested copy of the process, "with the return of the officer thereon, describing such property." Gen. Sts. c. 33, s. 32, R. L. 1190. And as to such property as may be attached by copy in town-clerk's office, there is the same requirement as to the endorsement of the return. R. L. s. 876. All that this return shows is that a list of the property attached was endorsed. This fails to comply with the requirement of the statute in a material respect. If the copy does not have the return endorsed on it, there is nothing to show an attachment. The return is the substance of the document. These statutes provide a method of attachment without taking possession, and without substantial compliance there is no attachment.

It is suggested that under the rule of reasonable intendment in favor of returns, it might be presumed that the return was endorsed on the copies delivered to the lessee and town clerk, and that that was what the officer meant by the statement that a list of the property was endorsed thereon. If the fact had been according to the presumption suggested, then the plaintiff presumably would have got leave to amend the return according to the fact. If in fact there was no return on the copies, then there was no attachment; therefore to presume there was a return might be the imposition of rights as of an attachment when there was none. It would in effect be to give the plaintiff a recovery against the defendants as trespassers, when they never were trespassers. There would be this dangerous use of a presumption without necessity, as an amendment would doubtless have been allowed upon a showing that there was an attachment in fact.

We think the writ and return does not show title in the plaintiff by an attachment lien; and we assume that it was on this

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ground that the return was excluded. The rule is that where an officer is a party either claiming or justifying under his own official acts, his return must be received as evidence. Drake, s. 210. But the same question would be raised by excluding it for insufficiency, as by admitting it, and then holding it insufficient.

This would affirm the judgment below; but on motion of the plaintiff the judgment is *pro forma* reversed and the cause remanded, in order to give an opportunity to have the return amended if there is ground for it.

F. G. ROSS & WIFE v. J. F. DRAPER.

Gift. Reference. Amendment. Officer Put on Inquiry.

1. It is the cause of action which is referred; and such a judgment is to be rendered upon the facts as any legitimate amendment of the declaration will admit of; thus, in an action of replevin, when husband and wife are joined, if the declaration does not allege that they are husband and wife, and that she is the owner of the property, it may be amended so as to show these facts.
2. The law only requires the donee to take such possession as the nature of the property admits of in order to protect it against attachment by the creditors of the donor; thus, a father having purchased a piano for his daughter, moved it into his house, and, some two months afterwards, on her attaining her majority, made her a birthday party, and in a formal and public manner, in the presence of all the guests, gave it to her. After this the daughter used the piano as her own, and all the family treated it as hers, except it was stored in the father's house, and by his consent was attached, without her knowledge. After her marriage she lived at her father's house some, and away some, but the piano was left where it had been, as she had no place to put it. *Held*, that the title to the property passed, and that it was not attachable by the creditors of the donor.
3. The officer making the attachment was bound to take notice of the fact that the property was not in the possession of the debtor, and inquire of those on whose premises and in whose possession he found it, for whom they held it; and he and the creditor were affected by all the knowledge that would be gained by such inquiry.

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REPLEVIN. Heard by the court on the report of a referee, September Term, 1882, ROYCE, Ch. J., presiding. Judgment for the defendant. The case is stated in the opinion.

Farrington & Post, for the plaintiffs.

The cause having been referred, all questions as to form are waived. *Granite Co. v. Farrar*, 53 Vt. 585; *Morse v. Beers*, 51 Vt. 359. The husband and wife may sue jointly. *Myers and Wife v. Lyon*, 51 Vt. 272. The gift was valid in law. *Flanagan v. Wood*, 38 Vt. 332; *Niles v. Warner*, 19 Vt. 609; *Hall v. Parsons*, 17 Vt. 271; *Allen v. Egerton*, 3 Vt. 442; *Stiles v. Shumway*, 16 Vt. 435; Rob. Dig. 619.

John I. Gleed, for the defendant.

The gift was incomplete, as there was not a sufficient delivery of property. 2 Kent (8th Ed.), 554; 20 Vt. 597; 53 Vt. 57; 47 Vt. 513.

The opinion of the court was delivered by

Ross, J. I. This is an action of replevin for a piano. The case was referred and came to the County Court on the referee's report. Such a judgment was then to be rendered upon the facts reported as any legitimate amendment of the declaration would admit of. An amendment alleging that the plaintiffs were husband and wife, and that the piano was the property of the wife, would neither add a new cause of action nor a new party to the suit, and would be permissible. The cause of action would be the piano both before and after the amendment, and the right in controversy would be that of the two plaintiffs to recover it. If the piano is the sole property of the wife, in an action at law the joinder of the husband as a co-plaintiff would be necessary. The bond was conditioned upon the right of the plaintiffs to have the piano delivered to them as against the defendant who had attached it as the property of a third person. Under the decisions of this court in regard to judgments on referees' reports, holding that the cause of action or subject-matter in controversy is the foundation of the judgment, if the pleadings can be so amended legally as to

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conform to the facts reported, we entertain no doubt of the right of the plaintiffs to maintain the action, if the facts reported entitle the wife to the possession of the piano.

II. The controlling facts found by the referee are that in 1864 the wife's father bought the piano for her, and, in two or three months after, on the occasion of her attaining her majority, gave her a birthday party, and in the presence of the assembled guests, took her to the piano, told her that was her birthday present from him and that he gave it to her; that thereafter the family always spoke of it as her property and that she used and treated it as such; that she remained at home until her marriage in 1867; that she then went away from home to live, and left the piano in her father's house, and never removed it therefrom, as she never had a suitable place to put it; that she visited her father's house from time to time, stopping three or four months seven or eight years ago, and had been living in her father's family for the last three years and more, and on all these occasions used and treated the piano as her own; that the piano remained all this time in the house of her father; that her husband always treated it as her separate property; that in 1877 it was attached and sold by the consent of her father as his property unbeknown to her, but was not removed from his house. There is no fact found, save his consent to its sale, that after the gift the father ever exercised dominion over the piano further than to store it in his house. The only question submitted by the referee to the court is whether these facts constitute a valid gift of the piano from the father to the plaintiff wife. We entertain no doubt on this question. The language used, as well as the occasion, indicate a clear intention of the father to pass the title of the piano to the daughter, and as clearly her intention to accept the gift. There was, therefore, the making and acceptance of the gift. He spoke of it, as did the family thereafter, as her property. She used and treated it as her property. This must mean that she assumed and exercised the dominion of an owner, took and retained such possession as the nature of the property admitted of, if capable of being locked, took possession of the key, locked and unlocked it, used it her-

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self, and dictated in regard to its use by others. It matters not that the property was of such a nature that she could not take it into manual possession, as she could have a watch, ring, or set of jewelry. If the gift had been of either of the last-named articles, and the referee had found that thereafter the daughter ever used and treated it as her property; that the father and family so treated and spoke of it, although it had been kept in her father's house, and on her marriage and leaving the home of her childhood, because she had no suitable place to keep it she still left it there, could there be the least doubt it would be a perfected gift, that the owner would be the daughter both as against the father and his creditors? We think not. The law recognizes the fact that all species of personal property are not capable of the same kind of possession, and it only requires the purchaser or donee to take such possession as the character and nature of the property admit of, in order to protect it against attachment by the creditors of the vendor or donor. *Sanborn v. Kittredge*, 20 Vt. 632; *Hutchins v. Gilchrist*, 23 Vt. 82; *Birge v. Edgerton*, 28 Vt. 291; *Fitch v. Burk*, 38 Vt. 688; *Sterling v. Baldwin*, 42 Vt. 311.

The property in contention was of that bulky character that forbids manual possession. The only possession its nature admitted of consisted in its use and treatment. The treatment of an owner includes acts of dominion and control. The property itself was such as is much more generally used by females than males, and for that reason more likely to be owned by the former. The occasion when the gift was made, especially in a country town, would give notoriety to the transaction equal to a sale in market overt. It is to be remembered that in these days it is not an uncommon thing for the wife and the children, while living at home, each to have and keep separate property in the common home of them all. It is not a matter of course, and no creditor has the right to assume, that all the personal property in the house belongs to the husband and father. It is not uncommon for the daughters to have rooms set apart for their special use, furnished with furniture purchased by, or given to them, nor for them to own sewing machines or musical instruments. The facts reported do not show a joint possession of the piano by the father and

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daughter during the two or three years she was at home after the gift and before her marriage, nor after her marriage. He allowed it to be kept upon premises owned by him. This was the extent of his use, control and acts of ownership, save alone his consenting to its sale on his debt some twelve or thirteen years after he had given it away, and this act was not known by the daughter until long after it transpired. The attaching creditor, who was the purchaser at the sale, never took possession of it. The defendant attached it as the property of such purchaser. He found it not in his possession but on the premises of the father, and in the possession of the daughter. He was bound to take notice of the fact that the property he was attaching was not in the possession of the debtor, and was bound to inquire of those on whose premises and in whose possession he found it, for whom they had the piano in store and in possession. *Hildreth v. Fitts*, 53 Vt. 684. Being bound to inquire, he and the creditor for whom he was acting were affected by all the knowledge that would be gained by such inquiry. He would have learned of the gift, of the notoriety that accompanied the making of it, that thereafter the father and family spoke of and treated it as the property of the daughter; that she always so used and treated it, and for over two years before her marriage had it in her personal possession, so far as the nature of the property was capable of personal possession. The transaction was natural, honest, notorious, and of long standing. There was no fraud in fact intended or attempted. The property was not in the possession of the debtor, hence no fraud in law.

Judgment reversed, and judgment rendered for the plaintiffs to recover nominal damages and costs.

See *Fletcher v. Fletcher*, *ante*, 325.

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A. O. BRAINERD v. WILSON DRAPER.

Evidence. Memorandum.

1. While the plaintiff was testifying in chief he referred to a pocket diary to refresh his recollection, and read some portion of it. On cross-examination the defendant offered the whole book to show that the witness had not been in the habit of keeping a diary. *Held*, that it was competent for the court to limit the use of the book to what had been read; as the witness did not claim to have kept a diary of *all current events*, but only what transpired on *one occasion*.
2. The question being whether a note, signed by the defendant, endorsed by the plaintiff, to a trust company, he afterwards becoming the owner and bringing suit, had been fraudulently altered, and while the treasurer of the company was testifying in chief, the defendant's counsel, on the request of the plaintiff were stopped by the court from examining the company's books. *Held*, no error; as it did not appear for what purpose the books were being examined; or, that they were asked for, or, refused on *cross-examination*.
3. The president of the trust company was properly allowed to state, in rebuttal, that he would not have discounted said note without the endorsement of the plaintiff; but, if not, it was harmless to defendant, and not vitiating error.
4. The fact that the note was not protested is not evidence that it had been fraudulently altered.

ASSUMPSIT on a promissory note. Plea, general issue, and trial by jury, April Term, 1882, ROYCE, Ch. J., presiding. Verdict for the plaintiff. Questions of evidence: The plaintiff claimed that defendant signed the note in question; that he himself endorsed it to the St. Albans Trust Company; that he afterwards became the owner of the note, and that it was the same as when signed by the defendant. The defendant claimed the note had been fraudulently altered by inserting the words, "order of A. O. Brainerd at." The note was not paid when due, but was not protested for non-payment; and the plaintiff did not recollect that any written notice had been given him of non-payment, but his attention had been called to this fact by the president of the company. The plaintiff was a director, and his brother, Lawrence Brainerd, president and manager of said company.

The plaintiff while being examined in chief had some pocket diaries before him, and examined them while testifying. Upon

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cross-examination the witness said he referred to those books to see what the dates were principally, and to refresh his recollections of what transpired at a meeting between him and said Draper on April 1st, 1879; and that he wrote the memoranda of what occurred between him and Draper under that date, and at said time. The witness read the memoranda. The defendant offered the pages read which were admitted. He then offered the whole book to show that the witness was not in the habit of keeping a diary, which was objected to and excluded.

The plaintiff in rebuttal introduced as a witness, Heber Burgess, treasurer of the Trust Company, who testified, on direct examination, that he had been connected with the institution since 1874, and had charge of the books of the company; that he first saw the note after being signed on the 2d day of October, 1875, when he entered it on the books, and that he should say that it presented the same appearance upon its face as now; that the note was entered on the journal under the head of bills receivable, and of the date of October 2d, 1875, which entry read as follows: "S. E. Lassell, Wilson Draper, E. H. Rood note endorsed by A. O. Brainerd; note dated October, 1875, discounted this day." Said journal contained the general accounts of the Trust Company with its customers.

While the witness was testifying in chief the defendant's counsel obtained the books by his permission, and were examining them generally. The court sustained an objection to such examination. In rebuttal, Lawrence Brainerd, president of the Trust Company, was allowed to state that he would not have discounted the note without the endorsement of the plaintiff. The defendant's second request to the court was:

"That if the jury find that the note was not protested for non-payment, it is strong evidence to show that it was never payable to plaintiff's order, but was payable as claimed by defendant; and that the fact that notice was not given is strong evidence to show that it is as defendant claims."

The court omitted to comply with the request.

Farrington & Post, for the plaintiff.

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H. S. Royce and Wilson & Hall, for the defendant.

The opinion of the court was delivered by

ROWELL, J. Plaintiff referred to his diary to refresh his recollection of what transpired on a certain occasion, and sought not to strengthen the memorandum as evidence by showing that he was in the habit of keeping memoranda of current events. Showing by the diary that he had no such habit would neither have contradicted him nor lessened the force of the memorandum as evidence. It was competent for the court to limit the use to be made of the book as it did. *Commonwealth v. Haley*, 13 Allen, 587; *Commonwealth v. Jeffs*, 132 Mass. 5; 1 Whart. Ev. s. 525.

It does not appear for what purpose counsel were examining the bank books when their further examination was stopped by the court. It was while the witness was testifying in chief. Their examination does not appear to have been asked for nor refused on cross-examination. No error is apparent.

What Lawrence Brainerd testified to in rebuttal seems to have been in accord with plaintiff's opening. But if not, it was harmless to defendant, and not vitiating error.

The court properly omitted to comply with defendant's second request. It embodied the legal proposition that non-protest was evidence of a crime having been committed, whereas crimes are never to be presumed, even in the trial of civil issues, and evidence is to be reconciled with innocence rather than regarded as indication of guilt. When an act or a fact is fairly susceptible of two interpretations, one lawful and the other unlawful, the lawful will be adopted. 2 Whart. Ev. s. 1249. Here, the fact of non-protest was evidence of a waiver of protest rather than of a fraudulent alteration of the note.

Judgment affirmed.

JOHN HOGABOON AND OTHERS v. TOWN OF HIGHGATE.

Resurvey of Highway. Appeal. Statutes, Repugnancy in.

1. When the selectmen resurvey a highway, thereby establishing the original boundaries, there is no appeal from their decision to the County Court. The remedy by petition and appointment of commissioners applies only where a road *has been laid out or altered*.
2. Those who have encroached on a highway by fences since the statute of 1853, R. L. s. 3125, are not entitled to damages on a resurvey by selectmen, establishing the original boundaries.
3. When two statutes are repugnant the one last enacted prevails, and repeals the former so far as the repugnancy extends, but no further.
4. R. L. ss. 2920, resurvey of highway, land damages; 125, possession gains no right in highway; 2940, lay out, &c., petition to County Court,—construed.

APPEAL—by way of petition for commissioners—from the action of selectmen in resurveying a highway. Commissioners were appointed, September Term, 1881, and their report heard April Term, 1882, ROYCE, Ch. J., presiding. Judgment *pro forma* upon the report that the proceedings of the selectmen be quashed, and for the petitioners to recover their costs. The facts are stated in the opinion.

H. S. Royce and *H. S. Johnson*, for the petitioners.

Burt, Hall & Burt and *J. A. Fitch*, for the defendant.

The opinion of the court was delivered by

VEAZEY, J. In 1881, certain residents of the town of Highgate addressed a petition to the selectmen to resurvey the Lampkins road, so called. The petition began as follows: "Whereas the original survey of the road on what is called Lampkins Street, in the village of Highgate, as recorded in said town of Highgate, is such that the terminations and boundaries of said highway cannot accurately be ascertained, therefore we . . . petition you to resurvey and lay out said highway, so that the northerly

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line of said highway will be three rods distant from," &c. Then follows the description, calling for a three-rod road. The selectmen reported that they "resurveyed the Lampkins road, so called," and "find and locate said road as follows:" Then they give the description by degrees and distances from a given point. The road fences and the occupation had not been on the line as thus described, and the petitioners in this case, treating the survey by the selectmen, not as a strict resurvey and establishment on the original boundaries, but as an alteration and enlargement of the road as first laid out, and feeling aggrieved thereby brought this petition to the County Court, under the statute, which, although an original proceeding, is usually spoken of, and is in the nature of, an appeal from the action of the selectmen.

At the September Term, 1881, of the County Court to which this petition was returnable, the defendant town filed a motion to dismiss the same, on the ground that the statute does not provide for a petition in the nature of an appeal from a resurvey by selectmen. The County Court *pro forma* denied the motion and appointed commissioners, to which the defendant excepted. The commissioners made report to the April Term, 1882, and the County Court rendered a *pro forma* judgment thereon, quashing the proceedings of the selectmen, and for the petitioners to recover their costs, to which the defendant excepted. The first question is whether the action of the selectmen was anything more than a resurvey and a finding and locating of old boundaries. If it was nothing more, then the motion to dismiss should have prevailed, because there can be no appeal from a simple resurvey. The remedy by petition to the County Court and appointment of commissioners applies only when a road has been laid out or altered by selectmen. Sec. 2940, R. L.; *Penniman v. St. Johnsbury*, 54 Vt. 306.

It is possible that the petition to the selectmen would have warranted an alteration of the original boundaries, but we are inclined to think this report shows only a resurvey on the old boundaries. They say, "we resurveyed, found and located as follows." We think this means that they found the boundaries according to the original survey, and proceeded to locate them as

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they found them, so as to be permanent and certain; not that they located new and different boundaries from former ones. But if there was ground for doubt on this point, we think the report of the commissioners unmistakably shows that the survey of the selectmen was not an alteration; so that if the petition, which contained the report of the selectmen, was not dismissible on its face, it became so upon the report of the commissioners. This seems to us so apparent that we do not deem it justifiable to take the space required to set forth the long report which we have thus construed.

Another question arises as to the right of some of the petitioners to damages for removing their fences and for land damages. It appears that their fences stood in the highway as it was originally laid out, but they were put there since 1858. Prior to that time the statute provided that where it was found upon a resurvey that fences or buildings had stood within the surveyed limits more than fifteen years, they could not be removed or the lands enclosed taken for the highway without compensation, as in other cases of altering highways. Sec. 2920, R. L. In 1858, section 3125, R. L., was enacted, providing that no person shall gain a right or interest within the limits of a highway by occupation. This act necessarily repealed the previous act as to compensation in cases where the possession and occupation began after the act of 1858. Repeals by implication are not favored in law and are never allowed but in cases where inconsistency and repugnancy are plain and unavoidable; but if there are two statutes on the same subject which are repugnant, the latest operates as a repeal of the first so far as the repugnancy extends, but no farther. The latest expression of the legislative will must prevail. *Harrington v. Trustees*, 10 Wend. 550; Bac. Abr. tit. statutes D.; *Bowen v. Lease*, 5 Hill, 225; *Williams v. Potter*, 2 Barb. 316; *Van Rensselaer v. Snyder*, 9 Barb. 302; *Wallace v. Bassett*, 41 Barb. 92; *Dash v. Van Kleeck*, 7 John. 497; 2 Q. B. Rep. 84; *Potter's Dwaris on St.* 154; *Broom's Legal Maxims*, p. 27. In the light of this rule what was the intent in the enactment of 1858? It could not have been to prevent the accruing of a right in the nature of a possessory title in less than fifteen years,

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because without the enactment no such right could accrue in a less period. Therefore unless that act was intended to operate as a repeal of the previous law in the respect above stated, and unless it does have that effect, it has no operation at all.

Another answer to the claim of the petitioners in this case is that already stated, that the statute does not provide for an appeal by petition to the County Court, except where a highway has been laid out or altered by the selectmen, neither of which was done in this case. The County Court therefore had no jurisdiction for any purpose.

The *pro forma* judgment of the County Court is reversed and the petition dismissed.

NOEL B. BLAIR, ADMR. OF P. O. WETHERBEE'S ESTATE v.
ORSEMOUS ELLSWORTH.

Set-off. Witness Act, R. L. s. 1002. Usury.

1. A plea in set-off is allowable against a claim for usury.
2. The plaintiff having deceased, his administrator having entered to prosecute the suit, and on the hearing before a referee, the testimony which the plaintiff had given on a former trial having been reproduced by witnesses who testified from "recollection solely," the defendant is not a witness in his own behalf as to what the deceased party testified to, or, as to the reproduced testimony.
3. R. L. s. 915, set-off; s. 1002, witness act, construed.

ASSUMPSIT. Heard upon the report of a referee, September Term, 1882, ROYCE, Ch. J., presiding. Judgment on the report for the defendant upon his plea in offset to recover the sum of \$53.12. Exceptions by plaintiff. The case is stated in the opinion of the court.

G. A. Ballard, for the plaintiff.

Charles Soule, for the defendant.

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The opinion of the court was delivered by

VEAZEY, J. This is an action of assumpsit originally brought before a justice of the peace to recover usury claimed to have been paid by the deceased plaintiff P. O. Wetherbee in his lifetime, to the defendant, upon some promissory notes which the former owed the latter. A trial was had before the justice and an appeal taken to the County Court; and the case was there referred. After the cause was entered in the County Court, and before the trial before the referee, the plaintiff deceased and the administrator upon his estate entered and has since prosecuted the cause. The defendant pleaded in offset before the justice the interest due upon said notes. The plaintiff Wetherbee and the defendant both testified on the trial before the justice. The referee finds that it was proved before him that Wetherbee testified in the justice trial that he paid the defendant the extra interest as stated in his specifications. It appears that it was only by reproducing this testimony that the administrator could establish such payments, except some items that the defendant admitted. Wetherbee's testimony was not taken in writing by the magistrate or by a stenographer; but one of the counsel on that hearing took minutes of it. The referee allowed that testimony to be reproduced by the testimony of the magistrate and one of Wetherbee's counsel, who testified from "recollection solely," as stated in the report. Against the objection and exception of the plaintiff the referee allowed the defendant to testify upon such points as Wetherbee testified to in the justice trial, and so far as the testimony was reproduced before him and no farther. This testimony of the defendant was material, if admissible, and affected the result as found by the referee. The defendant objected and excepted to the plaintiff reproducing Wetherbee's testimony, but was satisfied with the judgment, and the case stands only on the plaintiff's exceptions. The referee allowed the offset as claimed before the justice, to which the plaintiff excepted.

The judgment of the County Court on the report was upon the theory that the referee was correct in allowing said offset and in admitting the defendant to testify as aforesaid; therefore it was error if either of the plaintiff's exceptions was well taken, the

plaintiff having filed exceptions to the report and to the judgment on the report.

I. The plaintiff's counsel insists that an offset is not allowable as against a claim for usury because such claim is not founded "on contract express or implied." R. L. s. 915.

If a person pays more than the legal rate, he may recover the excess "in an action of *assumpsit*." R. L. s. 2000.

There is no express contract to repay, but the defendant holds the plaintiff's money against right, and the statute has expressly provided for recovery of it in a form of action resting solely in promise express or implied. The statute in providing a remedy seems to have fixed the character of the defendant's holding of the money. But irrespective of this, implied contracts are those which the law raises, or presumes, by reason of some value or service rendered, and because common justice requires it. Kent's Com. vol. II. p. *450. We think this is one of the class of cases where from the circumstances the law implies a legal obligation and a promise, though there was no express promise and no intent between the parties to enter into a contract. *Paddock v. Kirtledge*, 31 Vt. 384; *Sumner v. Wilson*, 8 Mass. 161. The offset was properly allowed.

II. The more important and difficult question is as to the right of the defendant to testify, the original plaintiff Wetherbee being dead. He was disqualified as a witness unless saved by the last exception to section 1002, Revised Laws, which is as follows: "Or upon a question upon which the testimony of the party afterward deceased or insane has been taken in writing or by a stenographer in open court, to be used in such action and is used therein."

As before stated, the testimony of Wetherbee "taken in writing or by a stenographer" was not offered in evidence before the referee, but it was proved by witnesses from recollection. This was done under the common law rule that the testimony of a witness on a former trial of the same cause, but since deceased, may be reproduced, and may be proved by any person who will swear

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from his memory to its having been given. *Mayor of Doncaster v. Day*, 3 Taun. 262; *Glass v. Beach*, 5 Vt. 172. This applied to parties as well as other witnesses after the statute of 1852, (R. L. s. 1001,) was enacted removing the disqualification of interest in a witness whether a party or not. But with the view of preserving equality between the parties as witnesses, a proviso was attached to this statute to the effect that when one party was dead or insane the other party could not be a witness. This provision was absolute, and the statute remained in this way until 1876. In 1871 a case arose where the *defendant* reproduced at a subsequent trial the testimony of the original plaintiff given at a former trial, but since deceased, and it was held that under those circumstances the defendant could not be admitted to testify, but the court declined to say what the rule would be if the *administrator* who had entered as *plaintiff* had reproduced that evidence. *Walker, Admr. v. Taylor*, 43 Vt. 612. I find no other case where this question was raised. In 1876, an act was passed constituting what is above quoted as an exception to section 1002 of the Revised Laws, (No. 66, Public Acts of 1876). Therefore from 1852 to 1876, there was no express statute giving the living party a right to testify to meet the reproduced testimony of the person who was alive and was a party and testified at a former trial of the same cause, but who has since deceased. In 1876, the legislature passed in addition to No. 66, *supra*, another act, No. 83, in further amendment of the proviso to the act of 1852, enlarging the right of the living party to testify, but not so as to meet the demands of this case. Thus the subject was brought to the attention of the legislature in two bills, after the decision in *Walker v. Taylor, supra*, and was left as it appears in section 1002, R. L. The language of that section is not uncertain or doubtful, therefore there is but little occasion for the office of interpretation. But if that is resorted to, one rule is to bring the sense *out* of the words used, and not to bring a sense *into* them. Potter's Dwarries on Statutes, p. 144. Under another rule that the intent, and not letter, should govern, it is urged that there is no good reason for the limitation which the words import, and therefore no such limitation should be put upon the statute. There would be more

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force in this if the language was obscure. The plain meaning of the language used, with the circumstances under which it was used as above shown, makes it seem to us more likely that the legislature, for some reason satisfactory to itself, intended to go no further than is fairly implied by the words of the statute, and not to provide that the living party might testify in any case where the testimony of the deceased party on a former trial is reproduced, though not taken in writing or by a stenographer to be used in the suit. It seems to us better to leave the remedy to the legislature if there is necessity to go further than it has gone, than to practically legislate by construction, as we think would be the effect if we adopted the construction contended for by the defendant. Courts have no right to violate well-settled rules of interpretation for the sake of making a better statute than the legislature has seen fit to make. The foregoing are the only exceptions now insisted upon by the plaintiff. The referee made alternative findings, and the County Court rendered judgment upon the basis that the defendant was properly allowed to testify as above stated. With the testimony of the defendant excluded, as it should have been, the judgment of the County Court would have been for the defendant to recover upon his plea in offset the sum of \$25.73, being the excess of the sum allowed on said plea over the sum allowed upon the plaintiff's claims under the declaration.

Judgment reversed and judgment for the defendant to recover \$25.73, and interest.

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J. W. BARNES v. B. C. HALL.

Tax, Collection of. Bank Stock. Consideration. Nudum Pactum.

Prior to the passage of the statute of 1882, No. 11, s. 2, expressly providing therefor, bank stock could not be legally taken and sold on a tax warrant; hence, the plaintiff, as constable, having sold certain bank stock to the defendant, and he having promised to pay for the same, in an action based on the promise, *held*, that the selling was without law, and the promise without consideration.

ASSUMPSIT in five counts, four special and one common. Heard on demurrer to the first four, and plea of non-assumpsit to the fifth count, September Term, 1882, ROYCE, Ch. J., presiding. Judgment *pro forma* for the plaintiff. Many questions were raised as to the sufficiency of the declaration; but the main contention was whether, under our statute as it stood prior to the act of 1882, No. 11, bank stock could be taken and sold by virtue of a tax warrant. The plaintiff was collector of the village of St. Albans. It was alleged that, as such collector, he sold to the defendant fifteen shares of bank stock, of which H. L. Sowles was trustee; and that the defendant specially promised to pay for the same.

Noble & Smith for the defendant.

There was no authority in law or statute for the levy or distraint of shares of stock in a bank, or corporation, to pay a municipal tax. Shares of stock are not goods or chattels. Angell Corp. s. 560. Shares of stock are of so intangible a nature that the sale of them on execution is a mode of transfer not authorized by common law. *Howe v. Starkweather*, 17 Mass. 24; Angell Corp. ss. 588, 589; Rorer Jud. Sales, ss. 1078-1080. Incorporeal rights cannot be seized and sold on execution, except by force of statute. Rorer, 1068; and the statute must be strictly complied

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with. *Rorer*, ss. 1068, 1073; *Bank v. Ferris*, 17 Conn. 259. The enforcement as well as the assessing of a tax is peculiarly a *statutory proceeding*, and is peculiarly *in invitum*, and is to be prosecuted with scrupulous regard to the provisions of the statute. There was no statute, until the act of 1882, authorizing the sale of bank stock to pay taxes. *Cooley Taxation*, 229, 292, 304, n.; *Burroughs Taxation*, 309.

Farrington & Post, for the plaintiff.

Bank stock at that time could be taken and sold on a tax warrant. It is personal property; and the statute authorizes the taking of personal property on a tax warrant. R. L. ss. 375, 3258. The same custody and control or taking is required under a tax warrant as upon a levy of execution. What that custody and control shall be or what is sufficient, has been determined by the courts and not by the legislative enactment, except in special cases. The courts have determined that the same is required in the one case as the other. The tax warrant is of the same nature and has all the force of an execution, and the collector is subject and held to the same measure of liability as a sheriff or constable in levying an execution. *Dodge v. Way*, 18 Vt. 457; *Sherwin v. Bugbee*, 16 Vt. 439; *Cooley Taxation*, 302; *Burroughs Taxation*, 256, 257, 262; 1 Bouv. Law Dic. 485; *Hilliard Taxation*, 486; *Sedgw. Stat. & Con. Law*, 41, 359.

The opinion of the court was delivered by

ROWELL, J. "It is well settled that the law gives no remedy for the collection of taxes other than those provided by statute."—DEWEY, J., in *Crapo v. Stetson*, 8 Met. 893. "The legislature must decide upon the agencies by means of which collection of taxes shall be made."—*Cooley Taxation*, 34. "It is a familiar idea that the assessment and the enforcement of a tax is purely a statutory proceeding, and is peculiarly *in invitum*, and is to be prosecuted with scrupulous regard to the provisions of the statute. A tax assessed is capable of being enforced only in the mode prescribed by the statute."—BARRETT, J., in *Sumner v. Pinney*, 31 Vt. 719. "The power of an officer making a tax sale is purely

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statutory.”—ELBERT, C. J., in *Gomer v. Chaffee*, Supreme Court of Colorado, 15 Reporter, 398. “At common law, distress was in the nature of a pledge merely, and could not be sold at all.”—REDFIELD, J., in *Sherwin v. Bugbee*, 16 Vt. 439.

To constitute a valid attachment of personal property, it is necessary that the attaching officer take the same into his possession. Leaving a copy in the town-clerk's office gives the officer constructive possession, and is declared by statute to have the same force and effect as taking actual possession. Without an express statute for that purpose, the interest of the lessor in chattels in the hands of the lessee cannot be attached during the term, except perhaps by trustee process, because actual possession cannot be taken by the officer, as the lessee's possession cannot lawfully be disturbed. *Smith v. Niles*, 20 Vt. 315; *Brigham v. Avery*, 48 Vt. 602. So in distress for the non-payment of taxes, it was held in *Dodge v. Way*, 18 Vt. 457, that no valid lien could be created on personal property unless the collector took actual possession thereof.

Hence it follows that unless personal property is of that character and so situated that actual possession thereof can be taken, or there is some statutory provision for distraining it without taking such possession, it cannot be distrained at all.

The statute of 1878, No. 107, provided, for the first time, that whenever a collector distrained property that might lawfully be attached on mesne process by leaving a copy in the town-clerk's office, he might leave a copy of his warrant in such office, with his return thereon, giving a description of the property distrained, and the character and amount of the tax for the payment of which it was taken, and that he should thereby acquire the same right to hold such property as though it had been duly attached on mesne process. But this statute does not cover the case before us, as bank stock at the time in question could not be attached by leaving a copy in the town-clerk's office, but only by leaving a copy with the clerk of the corporation. R. L. s. 3236. Said section provides that the capital stock of private corporations may be taken and sold on execution like other personal property, and how it shall be done, but it does not include tax-warrants any

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more than did the statute providing for taking property on "a writ of attachment or execution" by leaving a copy in the town-clerk's office. Although a tax-warrant is in the nature of an execution, it is not an execution, as the terms are used in our statute or understood in common parlance; and although this court always has been and still is desirous of upholding and carrying into effect all laws for the assessment and collection of taxes, yet it cannot go beyond the law, and commit the error of judicial legislation.

The result is, we regard this as *casus omissus*, and that prior to the passage of the statute of 1882, No. 11, s. 2, expressly providing therefor, there was no mode provided by law for taking and selling bank stock on a tax-warrant; hence, defendant's promise is *nudum pactum ex quo non oritur actio*.

Judgment reversed, demurrer sustained, the first, second, third, and fourth counts adjudged insufficient, and cause remanded.

ORVILLE BISHOP v. D. L. ALLEN, EMILY M. ALLEN, MARY
B. FELTON AND J. M. BEEMAN AND SON.

[IN CHANCERY.]

Mortgage. Running Clause in.

A mortgage, executed by a husband, his wife and her mother, on property owned jointly, to secure the mortgagee for entering into a recognizance in a bastardy case against the husband, contained, also, the following clause: "*and pay him all sums of money now due or that may be due from us hereafter.*" Both the mortgage and the equity of redemption were assigned. Each of two of the mortgagors owed a separate debt to the mortgagee. The mortgagors did not know that said clause was in the mortgage, as the mortgage was not read to, or by, them; but they might have read it; and no fraud was practiced by the mortgagee. *Held,*

1. That both debts were secured.

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2. That at all events, the mortgage contained enough to put the assignees of the equity on inquiry.
3. That it was the fault of the mortgagors that they did not know what was in the mortgage; and equity does not relieve the negligent.
4. *Tabor v. Cilley*, 53 Vt. 487, distinguish'd.

PETITION to foreclose a mortgage. Heard on a special master's report, September Term, 1882. ROYCE, Chancellor, decreed a foreclosure. It appeared that the mortgage in question rested on property owned jointly by the mortgagors; that it was given to J. M. Hotchkiss to secure him for entering into a recognizance in a bastardy case against said D. L. Allen; that the mortgage had been assigned to the petitioner, and the equity of redemption to defendants, Beeman & Son; that the mortgage contained the following:

"The conditions of this deed are such that, whereas the said J. M. Hotchkiss has entered into a recognizance for the said D. L. Allen in a case of bastardy in favor of Eliza Thomas against said Allen in the sum of four hundred and fifty dollars conditioned for his appearance in the Franklin County Court next to be holden at St. Albans on the second Tuesday of April, 1876, now if we the said Allen Felton and Allen shall see said Hotchkiss clear from harm and expense in consideration of said recognizance, and pay him all sums of money now due or that may be due from us hereafter then this deed to be null and void otherwise of full force and effect."

Mary B. Felton was the mother of D. L. Allen's wife. The master found as to the execution of the mortgage:

"That on the 15th day of October, 1875, the day of the execution of said deed, the defendant D. L. Allen was under arrest upon a bastardy complaint brought against him by one Eliza Thomas; that he was in the custody of Luther B. Hunt, an officer, and that Charles Soule, Esq., was acting as attorney for the prosecutrix in said complaint; that Allen applied to J. M. Hotchkiss to become bail for his appearance at the April Term, 1876, of the Franklin County Court, to answer to said complaint, and thereupon said Hotchkiss, in Charles Soule's office, drew up the mortgage and signed the recognizance for Allen's appearance, at that time stating that he would leave it with the court that if Soule came back and said the mortgage was executed, then he would become responsible as bail. He then gave the mortgage to Soule and requested him to go up with it and take the acknowledgment of the signatures. Allen was present in Soule's office and was held in custody by Hunt until after the execution of the mortgage by Mrs. Felton. From Soule's office Allen, Soule and Hunt went to Allen's house where the mortgage was signed and acknowledged by Allen and his wife, Emily M. Allen. Soule and Hunt then proceeded to a boarding house seventy or seventy-five rods distant from Allen's house, which Mrs. Felton was then keeping. When they arrived it was late in the evening and Mrs. Felton had retired. Allen went into her room, and she afterwards came out and

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signed the mortgage in the presence of Allen, Hunt and Soule. I find from the testimony of the defendants, D. L. Allen and Mary B. Felton, which was seasonably objected to by the petitioner, on the ground that being parties to the mortgage in suit and the other party being dead, they were disqualified from testifying under the statute, that neither of them read or heard read the mortgage previous to signing and acknowledging the same, and that neither was aware of the existence of the last, or running clause, in the condition of said mortgage, or understood that said mortgage was given for any other or further purpose than to secure said J. M. Hotchkiss for becoming Allen's bail. I find from the testimony of Mrs. Felton that her first knowledge of the existence and effect of said running clause was obtained from a conversation with Dr. Hawley some weeks after the execution of said mortgage, and that afterwards when requested by Cephas A. Hotchkiss, in behalf of J. M. Hotchkiss' estate, to pay or secure the account she declined, stating to him that it was secured by said running clause. I also find from the testimony of said Allen and Mrs. Felton that they could both read the handwriting of J. M. Hotchkiss readily, and from their and also from other testimony adduced before me, that both had said mortgage in possession and had opportunity to read the same before signing, and that neither requested to have it read aloud. I am unable to find from any evidence before me that any fraud was practiced or any attempt made to prevent said Allen or Mrs. Felton from reading."

The master found that said D. L. Allen owed a note to said J. M. Hotchkiss, amounting to \$65.80; that said Felton owed him an account, amounting to 98.08; and that said Allen had some offset, leaving a balance due on the note and account of \$88.23.

Noble & Smith and Geo. A. Ballard, for the defendants.

The running clause in the condition of the mortgage cannot stand. The Allens and Mrs. Felton did not know of this; and courts of equity will carry out the *intention* of parties. *Frank v. Cole*, 10 Ill. 339. Allen did not propose to secure his *debt* to Hotchkiss. The subject was not mentioned to him. He was under arrest; wished for bail, and offered to, and supposed, he had secured that only.

If an instrument, by mistake of the author or draughtsman, does not speak the author's mind, it may be reformed. *Ward v. Camp*, 28 Ga. 74; 5 U. S. Dig. p. 287. The fact is undeniable that the mortgagors were deceived, and lured into signing an instrument different from what they intended or supposed they were signing. Equity will relieve. 5 U. S. Dig. p. 287; *O'Neil v. Teague*, 8 Ala. 345.

A court of equity will reform an instrument which, by mistake,

failed to execute the intention of the parties, as well upon equitable defence set up in an answer as in a suit brought directly for that purpose. *Hook v. Craighead*, 32 Mo. 405. The terms of the mortgage secure a present joint debt of the mortgagors and a future joint indebtedness. The orator seeks to have it cover the individual debts of two of the mortgagors. Owning a joint estate, the *presumption* is that their purpose in executing a joint mortgage was to secure some joint obligation. The rule applied in *Tabor v. Cilley*, 53 Vt. 487, must control.

Edson, Cross & Start, for the orator.

The running clause in the condition of the mortgage is valid. *Seymour v. Darrow*, 31 Vt. 163; *Daniel v. Colvin*, 16 Vt. 300. Beeman & Son are chargeable with all knowledge which they would have acquired, if they had made inquiry of J. M. Hotchkiss.

This case is not like that of *Tabor v. Cilley*, 53 Vt. 487. The debt of each of the mortgagors was secured. Exactness in describing the debt is not required. 1 Jones Mort. pp. 70, 345, 346; *Morrill v. Morrill*, 53 Vt. 79; *Booth v. Barnum*, 9 Conn. 287; *Sherris v. Craig*, 7 Cranch, 410. The recitals in a deed are conclusive, unless procured by fraud. Bigelow Estop. pp. 267, 281; Harmon Estop. p. 231; 3 Wash. Real Prop. p. 252; *Hollenbeck v. Dewit*, 2 John. 404; *Gavagan v. Bryant*, 83 Ill. 376; 1 Story Eq. (Redf. Ed.) s. 200, a. There was confirmation by Mrs Felton. Kerr Fraud & M. p. 296; *Wright v. Peet*, 36 Mich. 213. Surprise without fraud is no ground for relief. *McDaniels v. Bank of Rutland*, 29 Vt. 230.

The opinion of the court was delivered by

ROWELL, J. On the facts found, it was the mortgagors' own fault if they did not know the full contents of the mortgage. There was no fraud on the part of the mortgagee, nor on the part of any one representing him. If the mortgagors were then content not to use the means of knowledge they had at hand, they and their assigns must now be content to stand to the mortgage according to its terms and import. Courts of equity do not sit

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for the purpose of relieving parties, under ordinary circumstances, who refuse or neglect to exercise reasonable care and prudence to protect themselves. Equity relieves the vigilant, not the negligent. 1 Story Eq. Jur. s. 146, n. 2, s. 200, a; *McDaniels v. Bank of Rutland*, 29 Vt. 230, 238. The running clause must stand. But what is the interpretation thereof? Its language is this: “. . . and pay him all sums of money now due [from us] or that may be due from us hereafter.” It would seem that no great violence would be done to this language if it were held, without the aid of accompanying circumstances, to include a several as well as a joint indebtedness. But when we consider that at the time of the execution of the mortgage no joint indebtedness in fact existed, and that it does not appear that any was then expected thereafter to exist; and especially when we consider that Mrs. Felton, when called upon by the administrator of the mortgagee to pay her account due the estate, refused because it was secured by the mortgage—thus showing how she understood the matter,—there can be but little question that said clause should receive the construction contended for by the petitioner. And this construction must prevail against the assignees of the mortgagors as well as against the mortgagors themselves. They were bound to take notice that a several indebtedness as well as a joint indebtedness might be secured by the mortgage. The case is unlike *Tabor v. Cilley*, 58 Vt. 487, invoked as conclusive against the petitioner on this point. There the mortgage described only \$1,000 of present indebtedness, but contained a clause to secure *future* indebtedness, and a reformation of the mortgage to make it cover \$1,750 of indebtedness existing at the time of its execution and intended to be secured thereby, was refused as against third persons who had acted in faith of the absolute statements of the mortgage as to the amount of present indebtedness secured thereby, and of the mortgagors’ statements as to the future indebtedness; while here the mortgage on its face is not misleading, but may well be taken to secure a several as well as a joint indebtedness, and, at all events, contains enough to have put the assignees of the equity of redemption on inquiry in this behalf, which they do not seem to

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have made, nor does it appear that they have in any manner acted on the assumption that the mortgage secured only a joint indebtedness.

Decree affirmed, and cause remanded.

ALEXANDER ARMSTRONG v. WM. P. NOBLE.

Note Transferred After Due. Offset. Payment. Wife a Witness.

1. The maker of a note, transferred after it is due, sued in the name of the transferee, cannot *plead in offset* a matter which existed between him and the payee at the time of the transfer, although he can, *payment*, or, any defence, which grew out of the note transaction.
2. When the maker of such note claims that he boarded the payee's wife, and that the payee, before the transfer, agreed the boarding should be a payment on the note, the fact that he did board renders the agreement more probable, and is, therefore, evidence.
3. A note having been transferred, an action having been brought in the name of the holder, the wife of the payee may be a witness for the maker, it not appearing affirmatively that her husband had any interest in the event of the suit, and her testimony not relating to any matter that would be a breach of marital confidence.
4. The admitting and withdrawing by the court of evidence in support of plea in offset to an action on a note transferred after due, which plea is an insufficient defence, does not fall within the rule announced in *State v. Meader*, 54 Vt. 126, that the error of admitting illegal evidence is not cured by charging it out of the case.

ASSUMPSIT upon a promissory note. Pleas, general issue, payment and offset. Trial by jury, September Term, 1882, ROYCE, Ch. J., presiding. Verdict for the defendant.

The plaintiff introduced the note in suit and rested. The note was payable to W. A. Armstrong, or bearer. It was endorsed to the plaintiff long after it became due, and only a short time before

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this suit was brought. The plaintiff is father of said W. A. Armstrong. The defendant's daughter was the wife of said W. A. The defendant introduced evidence, against the objection and exception of the plaintiff, tending to show that the wife of the payee of the note was and had been sick; that she lived in her father's family; that she had a child born in 1878; and to show particularly the condition of her health, and the expenses of boarding and maintaining her and her child, the amount of doctor's bills paid by him, and that said William A. contributed very little towards his wife's support.

The defendant also offered evidence tending to show that, after the execution of the note, it was agreed between him and said W. A. Armstrong, that the board of his wife and the sums paid by the defendant for her doctor's bills should be applied on the note. And the defendant claimed that said last-mentioned agreement, if established, would be a defence to the action, and if not, that an implied contract from the other testimony offered would be. And also, if the facts were established, he had a defence under his plea in offset. The plaintiff claimed that neither the evidence offered, nor any evidence, was admissible in support of such implied contract, nor of the defendant's plea in offset. The defendant offered the wife of said W. A. Armstrong as a witness to testify to the foregoing facts, excepting as to said special agreement, and also as to her husband's ill treatment of her on one or two occasions. The plaintiff objected to her being a witness in the case, but the objection was overruled, and she testified to the foregoing facts, excepting as to said special agreement, and the plaintiff excepted. The plaintiff introduced testimony tending to show no special agreement in relation to applying the board of Mrs. Armstrong and her child, and her medical attendance, upon the note, was ever made; and tending to show that Mrs. Armstrong was able to live with her husband, and, much of the time, to attend to her duties as a wife; that her husband had on several occasions requested her to come and live with him, but that she refused to live with him.

The court charged the jury that the defendant could not defend the action upon the ground of the implied agreement, which the

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defendant's evidence tended to show, nor upon the ground of offsetting claims of the defendant against W. A. Armstrong; and that the only questions of fact for the jury to determine were whether or not the special agreement which the defendant's evidence tended to show was made by the defendant and W. A. Armstrong, and the amount the defendant would be entitled to for boarding Mrs. Armstrong and child, and what he had so paid for medical attendance; that the only direct testimony upon that question was the testimony of the defendant, W. A. Armstrong, and Ami Armstrong; that the other testimony in the case was not to be considered by the jury, except so far as it might tend to show whether or not that agreement was made, and the amount the defendant was entitled to for board and medical attendance, and upon the question of the veracity of the witnesses who had testified in relation to said agreement, and that so far as the jury should consider that the other testimony in the case had a tendency to prove or disprove said agreement, or had a bearing upon the question of the veracity of the witnesses who had testified in relation to the agreement, and as to the amount to which the defendant was entitled for board, &c., and no further. They were at liberty to consider all the testimony in the case; and the court also charged the jury that they were at liberty to consider the fact that the defendant did, in fact, support and board the wife and child of said W. A. Armstrong, as bearing upon the question of whether said special agreement was made or not.

H. S. Royce, for the plaintiff.

The evidence in support of the plea in offset, and to prove the implied promise, was inadmissible; and charging it out of the case does not cure the error of admitting it. *State v. Meader*, 54 Vt. 126. The wife was not a witness. *Carpenter v. Moore*, 43 Vt. 394; *Sargent v. Seward*, 31 Vt. 509; *Wheeler v. Wheeler*, 47 Vt. 637; *Labaree v. Wood*, 54 Vt. 452; *Edgell v. Bennett*, 7 Vt. 534.

Noble & Smith, for the defendant.

The wife was a witness. *R. & B. R. R. Co. v. Lincoln's Est.*

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29 Vt. 206; *Carpenter v. Moore*, 43 Vt. 394. There was no error in the admission of evidence or charge to the jury. *Richardson v. Royalton*, 6 Vt. 496; *Kimball v. Locke*, 31 Vt. 686; *Camp v. Page*, 42 Vt. 746; *Buck v. Welch*, 38 Vt. 241; *Bennett v. Stacey*, 48 Vt. 163.

The opinion of the court was delivered by

Ross, J. The plaintiff took the note in suit long after the same fell due. He took it, therefore, subject to all the existing defences to the note itself, or which grew out of the note transaction, or out of any agreement between the defendant and the payee, in relation to it. He could not plead in offset a matter which existed between him and the payee at the time of the transfer to the plaintiff. *Walbridge v. Kibbee*, 20 Vt. 543; *Bowen v. Thrall*, 28 Vt. 382.

The defendant was allowed against the plaintiff's objection and exception to introduce evidence tending to show that prior to the transfer he had boarded the payee's wife under such circumstances that there was an implied promise on the part of the payee to pay the defendant therefor. The exceptions give no details of what this evidence was. On the face of it, it would seem to be a matter of offset rather than one which grew out of the note transaction, or that was connected with it. The statement in the exceptions that the evidence tended to show an implied promise from the payee negates the idea that there was in this testimony any evidence tending to establish an express promise from him to have the board of the wife applied on the note. An implied promise is one raised by the law from certain facts, and which the law enforces as though there was an express promise where, in fact, none exists. But there may have been something in this evidence that tended to connect this phase of the defence with the note. This court will not presume there was not, in order to find error in the action of the County Court in admitting this testimony. There should have been a statement in the exceptions that there was no evidence tending to connect the payee's implied obligation to pay the defendant for his wife's board, with the note, or, the evidence thus admitted should have been, by a

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reference thereto in the exceptions before this court, in order to sustain the plaintiff's exception on this contention. But after the evidence was closed the court, in the charge to the jury, withdrew this branch of the defence from their consideration, and held that the evidence on this point was insufficient to establish an implied promise or obligation on the part of the payee to pay the defendant for boarding the wife of the payee. This holding would seem to have cured any error the court may have committed in admitting the evidence. It is contended by the defendants, however, that inasmuch as the defendant failed to establish this branch of his defence, or to introduce sufficient evidence in the judgment of the County Court to warrant a submission of the question to the jury, the whole evidence on this subject was thereby rendered inadmissible, and that the case falls within the principle announced in *State v. Meader*, 54 Vt. 126. It is not quite apparent to the common mind, how evidence which tends to establish all the elements save one of a full defence, becomes inadmissible because the evidence to establish the lacking element happens to be wanting. But this branch of the defence was withdrawn from the jury. It is not manifest how the plaintiff can have been injured by the admission of evidence tending to establish it. It is not a case in which some portion of the testimony bearing upon the issue has been erroneously admitted, and the court has undertaken to cure the error by charging the jury to disregard the inadmissible testimony. The ruling of the court in withdrawing the entire issue on this defence from the jury was for the benefit and protection of the plaintiff. He should not be heard to complain of a ruling wholly in his favor. In this respect the case is distinguishable from *State v. Meader*. The doctrine announced in that case did not receive the approval of the entire court, and it should not be pressed beyond its legitimate limits.

II. The defendant's testimony also tended to show that the payee of the note, while he owned and controlled it, especially agreed with the defendant that the support of his wife should be a payment upon the note. It is contended that the court erred in allowing the jury to consider anything but the direct testimony

bearing upon this issue, and especially in allowing the jury to consider the fact that the defendant did board and support the wife of the payee as a circumstance bearing upon the probability of the payee of the note having made such special agreement. Whatever renders a claimed fact probable, or improbable, is proper evidence to be considered in determining whether the fact exists. If the defendant did not board and support the wife of the payee, it would be highly improbable that the payee would have made a special promise to pay for such support and have the same treated as a payment on the note. The fact that he did board and support the payee's wife and that it was the legal duty of the payee to furnish her such board and support, was a circumstance bearing upon the probability of whether he specially agreed to pay for the same. It is also claimed that the County Court allowed the jury to use all the evidence bearing upon the implied promise of the payee of the note to pay for his wife's support, in determining whether there was a special agreement that such support should be a payment on the note. An examination of the entire charge of the court is a clear refutation of this claim. After withdrawing the claim of the defendant that the evidence showed an implied promise of the payee to pay for his wife's support, the court to establish the special agreement in regard to such support being a payment on the note, confined the jury to a consideration of the direct testimony, and the circumstances *pro* and *con* bearing upon this issue. We find no error in the action of the court in this respect.

III. The wife of the payee of the note was allowed to testify in the case, but not as to any matters that would be a breach of marital confidence. The case neither on its facts nor pleadings showed that her husband had any interest in the event of the suit. Unless he was thus interested she was a competent witness in the suit. As has been frequently held and announced, error must appear upon the face of the exceptions. Every reasonable intendment is to be made in favor of the judgment of the County Court. It is for errors that appear upon the exceptions, and not for errors that rest on the assertion of counsel, that judgments are reversed.

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It is possible that the payee of the note is the real plaintiff. If not the real plaintiff, it is possible that he transferred it in such a way that he is legally bound to make good to the plaintiff whatever was apparently due upon the note at the time of the transfer. But there is no statement in the exceptions that either possibility is a reality. This court would commit a grave error if it should reverse a judgment of the County Court upon a *conjecture*.

Judgment affirmed.

O. A. BURTON v. ESTATE OF HIRAM BARLOW.

Res Judicata. Appeal. Presumption.

1. A plea of *former judgment* must show that the subject-matter of the present, is the same as that of the previous, litigation ; thus, in the first action the question was whether an appeal from the Probate Court had been properly taken and entered ; and in the second, whether the petitioner had been deprived of taking an appeal by fraud, accident, or mistake. *Held*, not to be *res judicata*.
2. The Supreme Court will *presume* that the County Court found that the petitioner was a creditor of the defendant estate, when it might have so found from the evidence, and without such finding, it could not legally have rendered the decision it did, nothing appearing to the contrary.
3. The County Court, under the statute, R. L. s. 1426, has the power in its discretion to grant leave to a creditor to enter an appeal from the Probate Court when he has been prevented from taking an appeal by fraud, accident, or mistake ; thus, the petitioner's appeal having been dismissed because of some defect in the bond which he filed with the Probate Court, the decision of the County Court allowing on petition an appeal is not revisable.
4. R. L. s. 1426. County Court power to grant appeal from Probate Court, construed.

PETITION to the County Court for an appeal from the Probate Court. Heard April Term, 1882, ROYCE, Ch. J., presiding. Appeal allowed. The petition alleged that the estate of Hiram Barlow, late of Fairfield, was indebted in a great amount to the

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petitioner ; that he was dissatisfied with the allowance of claims by the commissioners in favor of several other creditors ; that he applied in writing for an appeal ; that it was granted ; that he filed with the Probate Court such a bond as it required ; that the appeal was entered in the County Court, and, on motion of the appellee, was dismissed by that court ; and that the petitioner was "deprived of an appeal in said cause by mistake in not entering a bond as security to said estate." As to the manner of giving the bond the petition alleged that the judge of the Probate Court "then and there informed your petitioner that he would be required to execute a bond with a surety for said appeal, and that he, said judge, would draw up such a bond ; that said judge then and there drew up a bond for your petitioner to execute with a surety for said appeal ; that your petitioner and a good and sufficient surety then and there executed in due form of law said bond, and delivered the same to said court to the satisfaction of said court, and said appeal was granted."

The bond, drawn by the judge of probate, was in common form, and given to the Probate Court, as, "We . . . acknowledge ourselves jointly and severally indebted to the Probate Court," &c., with the following condition :

"That whereas, the commissioners appointed to receive and examine the claims presented against the estate of Hiram Barlow . . . have allowed claims presented by Sapho E. Barlow, Shattuck, Boutell and Start, A. S. Barlow, Ellen A. Barlow, and A. G. Soule to the amount of over twenty dollars each. And, whereas, the said A. O. Burton has claimed an appeal from the judgment and allowance of said commissioners to the next term of the County Court next to be holden at St. Albans, &c. Now if the above bounden A. O. Burton shall prosecute said appeals to effect and pay all intervening damages and costs occasioned by such appeals in case the judgment of said commissioners be affirmed, then said obligation to be void," &c.

Several reasons were given in the motion to dismiss the appeal ; as that, the other claimants were improperly joined ; that no bond was given to the State, or creditor, &c. The County Court adjudged that the appeal be dismissed ; and that judgment was affirmed by the Supreme Court. The County Court found from

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the evidence on the hearing of this petition "that the petitioner had been deprived of an appeal by accident in not filing a bond as is required by law"; and that the petition, as set forth above was substantially true, only it did not appear that the court found that the petitioner was a creditor. The other facts are stated in the opinion.

Edson, Cross & Start, for the defendant.

The former judgment operates as an estoppel. *Isaacs v. Clark*, 12 Vt. 692; *Porter v. Gill*, 47 Vt. 620; *Grey v. Pingry*, 17 Vt. 419; *Stearns v. Stearns*, 32 Vt. 678.

The petitioner has not been prevented from taking an appeal, through any mistake. If a mistake, it was one that arose from the want of ordinary care on his part, or that of his counsel.

Five minutes devoted to an examination of the statute,—which he was bound to make,—would have shown him what the law required, and the neglect of his counsel and of the judge of probate,—whom they appear to have made their agent,—to examine the statute, makes the case one of mere negligence, and of the grossest kind. This was not a denial of an appeal as in *Sabin v. Rounds*, 50 Vt. 74; but a neglect to take the necessary legal steps in applying for it; it is a gross neglect of a legal duty, in the first instance, as well as in not giving the proper bonds. It may be said the judge made a mistake; in one particular he had to follow the application made by the counsel. An accident, as defined by Judge STORY, is such unforeseen events, misfortunes, losses, or omissions, as are not the result of any negligence or misconduct of the party. And a mistake must not be the result of negligence or want of care. If the attorney knew what the law required, he neglected his duty. If he did not, it was his imperative duty to have ascertained. *Davidson v. Heffron*, 31 Vt. 687; *Burbeck v. Little*, 50 Vt. 713; *Burton v. Wiley*, 26 Vt. 430; *Ingraham v. Bank*, 17 Vt. 435.

H. S. Royce, for the petitioner.

The Supreme or County Court may in *its discretion* grant an appeal under such circumstances as these. R. L. s. 1426. When

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the Probate Court mistakes the law, and so improperly denies an appeal, an appeal will be allowed. *Sabin v. Rounds*, 50 Vt. 74.

Where an officer left a copy with the defendant, incorrectly stated the date of the return day, and the defendant was defaulted, it was held a mistake, and that the defendant had a remedy by petition, under the statute. *Kimball v. Kelton*, 54 Vt. 177. It does not appear that the decision of the court below was put upon any other ground than the exercise of its discretion upon the facts found. Therefore, the decision is not revisable by this court. *Davis v. Reed*, 32 Vt. 785.

The opinion of the court was delivered by

ROWELL, J. The subject-matter of the former litigation was not the same as the subject-matter of this. There the question was, whether an appeal had been properly taken and entered. Here the question is, whether the petitioner has been deprived of taking an appeal by fraud, accident, or mistake. The result of the former litigation necessitated a resort to this proceeding, and it would be strange to hold the matter to be *res judicata*.

It is further objected that the petitioner has no right of appeal, for that it does not appear that he is a creditor of the estate. It is not claimed that he was otherwise interested in the estate. The County Court had evidence before it from which it might have found that he was a creditor; and as it could not legally have rendered the judgment it did without such finding, it is to be presumed that it did so find, nothing to the contrary appearing.

The facts bring this case within the purview of s. 1426, R. L., which gives the County Court power, in its discretion, to grant leave to enter an appeal from the Probate Court; and for aught that appears, the court granted the leave in the exercise of that discretion, and hence its decision is not revisable here.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTY OF ORLEANS,
AT THE
AUGUST TERM, 1882.

PRESENT :

HON. HOMER E. ROYCE, Chief Judge.

HON. JONATHAN ROSS,
HON. H. HENRY POWERS, } ASSISTANT JUDGES.
HON. WHEELOCK G. VEAZEY, }

MARTHA J. KENDALL, AND HER HUSBAND, GEO. J. KENDALL
v. MISSISQUOI & CLYDE RIVER R. R. CO., CONN. &
PASS. RIVER R. R. CO. & SOUTH EASTERN
COUNTIES R. R. CO.

[IN CHANCERY.]

*Railroad. Land Damages. Estoppel. Statute of Limitations.
Joinder of Parties. Jurisdiction. Married Woman.*

The defendant, M. & C. R. R. Co., constructed its road across the land of the oratrix, a married woman, without complying with the statute as to taking land for railroad purposes, without her consent, and without any action of hers that amounted to an estoppel. After the road was surveyed and located, but before the oratrix' land was taken, the M. & C. R. R. Co. was mortgaged to secure its bonds owned by the defendant, the Conn. & Pass. R. R. Co., and leased

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to the defendant, E. C. R. R. Co. The mortgage was foreclosed and the title established in the bondholders. A bill having been brought to enjoin the defendants from occupying the oratrix' land, *Held*,

1. The defendants should be enjoined unless they pay the land damages.
2. The husband was properly joined as orator; also, the mortgagee and lessee, as defendants.
3. The claim is not stale, as demand was made within five, and suit brought within six, years. The Statute of Limitations does not apply.
4. Act of 1872, No. 32. passed after the land was taken, and repealed before suit, does not affect the case.
5. A Court of Chancery has jurisdiction, as it is not certain that there is a plain adequate and complete remedy at law.
6. There was no element of an estoppel. The oratrix by word or conduct did not induce any action or mislead anybody, either mortgagee or lessee. The defendants appropriated her land without right; she seasonably remonstrated, merely *allowing*, but not *inducing*, them to hold it, to perform as originally required by law.
7. *Knapp v. McAuley*, 39 Vt. 275, distinguished.

BILL IN CHANCERY. Heard on bill, answer, replication and testimony, February Term, 1882, Ross, Chancellor. Bill dismissed. The bill prayed:

"That the court may proceed to ascertain by the appointment of commissioners or a special master or masters or in whatever way the court may judge fit, the amount of the damage done said farm by the building of the railroad aforesaid, and to decree and enforce the same as an original and special lien on the road-bed of the Miss. & Clyde Rivers Railroad, or that the land may be decreed to her, and the defendants enjoined from running across the same," and for further relief. The oratrix was a married woman.

The defendants claimed by their answers that the oratrix gave their agents a license to construct the road on her farm; and introduced as testimony the following writing signed by the orator, her husband, and several other parties:

"We the undersigned hereby agree to take of the Missisquoi and Clyde Rivers Railroad Company the amount of damage that may hereafter be agreed upon between us or any of us and the directors of said railroad company, or be fixed by commissioners duly appointed to appraise said damages for such amount of land as said company may be legally entitled to take for the purpose of building their railroad across any land of ours or any of us, in the stock of said company at its par value.

(Signed),

GEO. J. KENDALL."

Newport, August 16th, 1870.

The oratrix denied that she knew that her husband had ever agreed to take stock for land damages. The other facts are stated in the opinion.

C. A. Prouty, for the oratrix.

The oratrix is still the owner of the land. The payment of damages is a condition precedent to the acquiring of any title to the land taken. *Stacey v. Vt. Cen. R. R. Co.*, 27 Vt. 39. There was no waiver of this condition. *Knapp v. McAuley*, 39 Vt. 275, is not an authority against the oratrix. There was an agreement to take stock. Here the testimony does not make out the waiver contended for. The agreement signed by the husband of the oratrix is of no avail, since it is not claimed that she knew that he had, or that she gave him, or that the railroad company supposed, he had any authority to sign such an agreement. A fair consideration of the testimony and the circumstances shows that the company never asked,—and never intended to ask,—her consent to the appropriation of her land. They simply took it. No estoppel. *Hall v. Chaffee*, 13 Vt. 157; *Bigelow Estop.* 443; *Lowell v. Daniels*, 2 Gray, 161; *Bemis v. Call*, 10 Allen, 512; 117 Mass. 241; 13 Pet. 107; 10 Cush. 276; 35 Iowa, 129; 20 Ohio, 401.

Crane & Alfred, for the S. E. R. R. Co.

The oratrix had full power to control and dispose of her separate real estate. *Jacques v. M. E. Church*, 17 Johns. 548. The *jus disponendi* is incident to her separate property. She can give it away; charge it with the debts of her husband. *Frary v. Booth*, 37 Vt. 78. She has the same power over it as a *femme sole*. *Gardner v. Gardner*, 22 Wend. 450; an independent, personal *status*. 1 Lead. Cas. Eq. Part 2, (4th Am. Ed.) 684, 68, 730; 20 Wend. 570; 11 Md. 492; 46 Mo. 504. She is bound by her acts, declarations, &c., as if *sole*. 2 Story Eq. Jur. 1400; 1 Lead Cas. Eq. Part 3, p. 740. It required no writing to relinquish her lien. 11 Vt. 555; *Imlay v. Huntington*, 20 Conn. 176. She had full power to *waive* her right. and did waive it. 3 Waite, Act. & Def.

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728; 1 Redf. Railways, s. 65; 3 Vt. 311; 39 Vt. 275. The oratrix' claim is stale and barred by the statute. R. L. s. 3371.

Edwards, Dickerman and Young, for the Conn. & Pass. R. R. Co.

It is too late for the oratrix to assert a prior lien. *Knapp v. McAuley*, 39 Vt. 275; 1 Redf. Railways, s. 65. A *femme covert*, in respect to her separate estate, is to be regarded in a court of equity as a *femme sole*, and she is to be regarded as a *femme sole* as to her right of contracting for, and disposing of, it. The *jus disponendi* is incident to her separate property, and follows of course by implication. She may dispose of it as she pleases; and her disposition of it will be sanctioned and enforced by a court of equity. Her acts, declarations and confessions, are evidence in the same manner and to the same extent as if she were a *femme sole*.

The oratrix was the absolute owner of the premises, unrestrained by any limitation, and held them to her sole use. This being so, she had the full power of a *femme sole* in regard to their disposition. 20 Conn. 176; 37 Vt. 78. There was no constructive notice to the mortgagees. None is provided for by law. Nothing was to be recorded. R. L. s. 1937. The payment of land damages is condition precedent to acquiring title. But it was waived. *Merrick v. Plumley*, 19 Mass. 566. The husband was her agent in taking the stock.

The opinion of the court was delivered by

VEAZEY, J. The defendants claim that the oratrix consented that the railroad should be built across her farm, and agreed to look to the company alone for her pay for land damages. We do not find this fact established by the evidence. She denied that she gave such consent, or was asked to, or agreed to take pay in stock or authorized any other person to so agree, or knew of her husband so agreeing, or was ever paid any damages, or was offered any. It is shown upon uncontradicted testimony that she was away from home when the company took possession of the land and began to build. It is not shown that she knew of this or consented to it, but it is shown by the defendants that she objected

after her return, unless paid her land damages. The work on her farm began in March, and continued through the season until the road was completed, without the interposition of legal proceedings to stop it. The defendants claim that even if she did not expressly agree to look to the company for pay, she is estopped from claiming a remedy by foreclosure or injunction. We think the defendants' evidence fails to show facts creating an estoppel. Mr. Baker, the defendants' principal witness, and the agent of the company to obtain rights of way, admits that he was notified that the oratrix was dissatisfied and did not want to have the work go on until the question of right of way over her land was settled, and says he saw her and explained their embarrassment for money just then, and asked to let the work go on, and said the company would be in condition to satisfy the claim; and if they could not agree "a commission could be called out to adjust the amount of the damages." Upon cross-examination this question was asked: "Did not you give the oratrix to understand in substance that if she would allow the road to be built, everything in regard to the damages should be satisfactory?" Answer: "I think I did. I told her that if she and the directors could not agree, they could call out commissioners; explained to her how this commission would be appointed; that they would be first-class men." He admits no price was agreed upon; says he avoided talking about that, and that she did not agree to take stock for pay. Putting the case upon the defendants' testimony, it shows that the oratrix was induced by Mr. Baker, in whom she had great confidence, by such talk as is indicated above, to let the work go on. It fails to show any waiver of rights by her, or that either party so understood it, or any arrangement for ascertainment or payment of damages other than the law provided. The company could acquire the right under her protest, only by arrangement between the parties, or by proceedings under the statutes through commissioners. If the latter method were adopted, it would create a lien in her behalf. She abstained from interference only by promises that one of these things should be done. Neither was done. She agreed to nothing beyond. The right to call out commissioners belonged to the company only. She was led to allow the company, under

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the circumstances above stated, to go on with the work by promises to do what the law required to be done in advance in order to acquire any right, and which if done would have been her protection. The case is distinguishable from *Knapp et al. v. McAuley et al.*, in the 33d and 39th Vermont Reports; because there the consent was under an arrangement for the subsequent ascertainment and payment of damages in the stock of the company, and there was no fraud, or failure to perform according to the agreement, on the part of the company.

The oratrix did not lull the railroad company by words or silence, but was herself lulled by promises to do that which was her right and its obligation under the law. The railroad company was then a trespasser; and the oratrix desisted from proceeding against it as such under these promises, in order to give opportunity to pay or to acquire the right and have the damages adjusted under the statutes which would create a lien as security for them. We think the Statute of Limitations does not apply to bar the oratrix' remedy by injunction. The company's promises secured its wrongful possession from interruption, but the oratrix' rights were unaffected, except possibly as to form of remedy. There was no contract between the parties. There was only a temporary conditional acquiescence to the possession, possibly of a nature to affect a remedy by ejectment, but not of a nature to make the possession rightful, without compensation. The continuance of the possession continued the oratrix' right to a remedy. The remedy provided by Act No. 32, Public Acts of 1872, is not applicable; because the oratrix' land was taken before that act was passed, and it was repealed in 1874.

Her claim is not stale; because it was the subject of discussion with an officer of the company at different times while the road was being built and subsequently, and within five years demand was made through an attorney, and within six years legal proceedings were instituted, and they have been followed ever since.

On the 2d day of March, 1872, which was before said railroad company entered upon the oratrix' farm to construct the road, the company mortgaged the whole road to trustees of bondholders to secure a large amount of bonds issued by the company, and the

bondholders were mainly if not entirely the Connecticut & Passumpsic Rivers R. R. Co. The trustees foreclosed this mortgage and the equity of redemption expired, fixing the legal title in them in trust for said bondholders. The oratrix made the trustees and bondholders parties defendant. It is now claimed in their behalf that they are not proper parties and the bill should be dismissed as to them with costs. This question is apparently one of very little consequence in this case, and received but little attention in the argument, and no copy of the mortgage was furnished. The general rule is that every person interested in the matter in controversy should be made a party to the suit. The facts were not sufficiently developed or submitted to show that these parties were not interested. There are cases where *cestuis que trust* are not only proper but necessary parties.

But it is further claimed in behalf of these defendants and the South Eastern Railway Company, which has operated this road since it was built, under a perpetual lease, that they had no notice in fact that the oratrix' land damages had not been paid, and that an enforcement of the oratrix' claims would work injustice upon them, they having loaned or paid their money and taken their respective titles in the honest belief that her damages had been settled for.

The lease and mortgage were both dated March 2, 1872, which, though after the survey and location of the road, was before the company took possession and began to build on the oratrix' farm. This was done in her absence and without her knowledge. Neither by word or conduct did she induce any action or mislead anybody. The ownership and record title were in her. The statute required an appraisal by commissioners where land was taken adversely, to be recorded in the town clerk's office of the town where the lands are located. It imposed no duty upon the landowner when his land was taken for a railroad, but left it to the company to act, in order to acquire a right of way. The company appropriated the land without right, and when remonstrated with seasonably, was allowed, not induced, to hold it, by promises, not in substitution of its original duty, but to then perform as originally required by law. It is difficult to read the evidence submitted without

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being somewhat impressed with the idea that the defendants' promises through its agent Baker were fraudulently made, and without any intent to perform. Certainly the case fails to show any intention of the oratrix that any party should be misled by, or act upon, her conduct. The case plainly lacks the elements required to constitute an estoppel. If these defendants were misled or acted upon a misunderstanding, it was the result of their own negligence.

It is further objected that this suit is improperly brought by the husband and wife; and it is claimed that the bill should have been filed by the wife alone by her next friend, and that her husband ought to be made defendant. There would be force in this claim if the suit related to the wife's *separate property* which she held in exclusion of the marital rights of her husband. But where the suit involves a married woman's rights, and it appears that her claim is not in opposition to rights claimed by the husband, which is this case, it is usual for the suit to be instituted by them jointly. Mitford & Tyler's Pl. & Pr. in Equity, p. 123, and cases there cited; *Bradley v. Emerson, et al.*, 7 Vt. 369; *Porter et al. v. Bank of Rutland et al.*, 19 Vt. 410.

We think a Court of Chancery has jurisdiction. In Story's Equity Jurisprudence the rule is laid down as follows: "It may, therefore, be said, that the concurrent jurisdiction of equity extends to all cases of legal rights, where, under the circumstances, there is not a plain, adequate, and complete remedy at law." The only remedy at law suggested is an action of ejectment. It is not plain that such action would lie. Having jurisdiction it is the duty of the court to have the damages determined, and its rights to proceed in this behalf by the appointment of masters for the purpose according to the usages in chancery. The complainant prays for an injunction unless the damages for taking the land are paid. Without deciding that this is the only remedy applicable, we think it appropriate, and warranted upon the facts established.

The decree of the Court of Chancery is reversed, and the cause remanded, with a mandate in accordance with the foregoing views.

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JAMES WILSON v. CHARLES WHEELER.

Voter. Who Eligible to Office of Constable. List. Evidence. Appraisal.

1. Under the statute of 1869, every male citizen of the age of twenty-one years subject to taxation in a town and resident therein is a voter in the town meeting of such town; and this is so although at "the annual assessment next preceding" he was a resident of another town, owning real estate in both towns, and assessed in both; and is eligible to the office of constable.
2. Meaning of the terms, *list*, *grand list*.
3. The only record evidence offered to establish the fact of the defendant's having been sworn was a copy of the record of his election, in which the word "sworn" appeared immediately after his name. *Held*, sufficient proof that he was sworn as the law requires. Parol evidence was also admissible to prove it.
4. The fact that the instrument written in the form of a bond but not under seal, which one executed who had been elected constable, does not occasion a vacancy in the office.
5. Copies of the warning and proceedings are admissible to prove the election of constable and listers, and that they were sworn.
6. The quadrennial grand list was admissible in evidence in an action against a constable for selling property for taxes.
7. The validity of a list as a basis of taxation is always upheld where it has appeared that it was made in good faith and the only errors complained of were the result of mistakes in judgment on the part of town officers; thus, although it is evident that the listers did not comply with the law in the ascertainment and appraisal of the real and personal estate, in neglecting to set in the list \$500 in money that should have been set to a ratable inhabitant, but no intentional wrong or fraud was attempted by them. *Held*, that the list was not thereby invalidated.
8. Act of 1869, voter in town meeting, construed.

TRESPASS with count in trover. Trial by jury, February Term, 1882, REDFIELD, J., presiding. Pleas, general issue, and justification as tax collector of the town of Brownington, and special replication by plaintiff. After the evidence was in, both parties in open court agreed to submit all issues of fact to the court. A verdict was ordered for the defendant. As to the question of whether there was a vacancy in the office of constable the exceptions stated :

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"The defendant also offered in evidence to show that said Wyman accepted said office and duly qualified for the discharge of the duties thereof by giving bond as required by law, an instrument written in the language of a bond for the faithful discharge of the duties of constable and collector, by said Wyman, for the term aforesaid, signed by said Wyman and two sureties, and properly witnessed, but it was conceded by the defendant that said instrument had never been sealed by said Wyman or said sureties. To the admission of this instrument the plaintiff objected, for that it was not a bond as required by the statute. Subject to the exception of the plaintiff, the same was admitted by the court. It appeared that this instrument was accepted by the selectmen of Brownington within ten days after the election of said Wyman as constable and collector for said term, and that he gave no bond as constable and collector during said term, unless said instrument is a sufficient compliance with the law. The defendant further offered in evidence the several warrants and rate-bills mentioned in his pleas, together with what purported to be the receipts of said Wyman as constable and collector for the same, for the purpose of showing that said Wyman received said warrants and rate-bills for the collection of taxes as alleged in said pleas, to the admission of which the plaintiff objected, for that the said Wyman having failed to give a bond as required by law, the office of constable and collector of Brownington had become vacant, and the said Wyman then had no authority to receive and hold for collection said several warrants and rate-bills, and that the same were irrelevant and immaterial."

As to the admission of the grand list :

"The defendant offered in evidence the quadrennial grand list of said town for A. D. 1874, but offered no evidence tending to show that the appraisal forming the basis of said quadrennial grand list for 1874, or that said grand list was lodged in the town-clerk's office of said Brownington on or before the 15th of June, A. D. 1874, as required by law."

As to the appraisal :

"The plaintiff asked each lister on cross-examination the following question, in substance: 'In taking the grand list for the town of Brownington for the years 1874 and 1878, how did you listers appraise the property,—whether at its true and just value in money, or otherwise?' The defendant objected to this question for the reason that the list being regular in form and duly sworn to by the listers in the form of oath prescribed by law, the

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grand list and oath appended were conclusive upon this subject, and for that this subject could not be inquired into by parol evidence. The court, subject to the objection and exception of the defendant, admitted the question and parol evidence upon this matter; and from evidence so admitted it appeared that one lister from each town in the county met at Irasburgh between March meeting and April 1st in each year in which the grand lists of Brownington are involved in this case, and agreed upon the then value of an average article of each class of property to be appraised in that year, and communicated such agreed value to every lister in Orleans county; that the same method was adopted in every county in the State, and had been for a great number of years then next preceding; that the listers of said Brownington in making the grand list of said town each year involved in this suit, *honestly and in good faith* endeavored to make their appraisal of each and every article as near to its true value as possible, taking such agreed value of the county board of listers as the true value of an average article of each class, properly and fairly increasing or reducing each particular article as it was above or below an average of its class. The whole list each year was made in this manner. It also appeared from a certified copy of the journal and proceedings of the State Equalizing Board for 1878, put into the case, that the valuation of said Brownington as first fixed by its listers was reduced two per cent. by said State Board of the year 1878. It also appeared that by adopting this method in making the quadrennial appraisal and quadrennial grand lists for A. D. 1874, and A. D. 1878, and the annual grand list for A. D. 1878 of said town, the listers purposely estimated and appraised the real estate and personal property, including money and debts due from solvent debtors, at about two-thirds the actual value thereof in money, and at about two-thirds the value at which they would then have appraised the same in payment of a just debt due from a solvent debtor, and set the same in said grand lists at such estimated and appraised valuation. There was no evidence tending to show any design or intent on the part of said listers, or either of them, to make the lists of persons taxable in said Brownington lower for the same property than the average basis of appraisal agreed upon for Orleans County, or the State at large; but on the contrary it appears that it was the honest intention of said listers to appraise all the taxable property in said town of Brownington as near as possible to the average valuation of the same kind and quality of property throughout the County and State, and that they acted in good faith in carrying out such intentions. There was no evidence in the case tending to show

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that said appraisals in said Brownington, and the grand lists based thereon involved in this case, were not equal among the citizens of said Brownington, or that the appraisals and grand lists of said town were not equal and fair as compared with the other towns in Orleans County, or in the State, or that said grand lists were either of them so made as to cast any greater or less burden of public taxation upon the taxpayers of said Brownington than upon the taxpayers of any or all other towns in the State.

. . . It appeared . . . that said listers in taking and making the annual list for A. D. 1878, purposely omitted from said grand list about five hundred dollars in money belonging to a ratable inhabitant and taxpayer of said town, who was the grandfather of one of said listers, after his list including said money had been taken and before the grand list book was filled out. This sum of about five hundred dollars was omitted and stricken from the list by said listers before the day set for hearing parties aggrieved, and was done at the solicitation of one of said listers, who was a grandson of the party so assessed, and who represented to the other listers that his said grandfather was 'an old man and he didn't think he had any more money than would support him through life'; and it did not appear that any other objection was made to such assessment, and it was not claimed on trial by the defendant that said money was not subject to taxation in said town of Brownington.

"The said town of Brownington elected three listers at the March meeting in 1878, and no more were ever elected to serve during that official year. In taking the annual list of the plaintiff for A. D. 1878 only two of the listers visited his premises and made a personal inspection of his stock and other personal property listed to him. The other lister was engaged in taking the grand list in another part of the town and did not see the plaintiff's stock to appraise it, and had nothing to do about taking the plaintiff's said list, except to talk the matter over with the other two listers at a time subsequent to the day when the memoranda of articles of plaintiff's property were taken by two of said listers and then only to see if the value had been taken upon the basis previously agreed upon by them."

L. H. Thompson, for the plaintiff.

The defendant was not a voter, and was therefore ineligible to the office of constable. Gen. St. 1036 (No. 50 of 1869); R. L. s. 2644; Gen. St. c. 15, s. 13; *Cummings v. Clark*, 15 Vt. 657; *Courser v. Powers*, 34 Vt. 518. Number 58 of the laws of 1872

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requires that constables shall be sworn before entering upon the duties of that office, and that the town-clerk shall make a record thereof. The act is mandatory in all its provisions. The word "sworn" after the name of the defendant in the record of his election to said office, and after the name of Wyman, and after the names of said listers, as detailed in the exceptions, is not such a record of the taking of the official oath as said statute contemplates or requires. It does not disclose the kind nor the nature of the oath, nor by whom administered, but these essential requisites are left wholly to implication or conjecture. Under this statute it is not competent to prove the taking of said oath by parol. No legal bond was given. The plaintiff had no legal grand list in Brownington. *Ayers v. Moulton*, 51 Vt. 118; *Reed v. Chandler*, 32 Vt. 286; *Houghton v. Hall*, 47 Vt. 334.

The *intentional* appraisal by the listers at only about two thirds of its value of all the property included in any and all of the grand lists, and the placing of such property in said lists at such valuation render the lists invalid as a basis of taxation. *Cooley Taxation*, 152, 153, n.; 10 Wis. 263.

Edwards, Dickerman & Young, for the defendant.

The word "sworn" when applied to a public officer, as constable, means that he is sworn to the faithful discharge of his duties. R. L. s. 14. Parol evidence was admissible to prove that the listers were sworn. *Day v. Peasley*, 54 Vt. 310; *Blodgett v. Holbrook*, 39 Vt. 336; *Hayes v. Hanson*, 12 N. H. 284; *Converse v. Porter*, 45 N. H. 385. The fact that the bond was not sealed does not affect this case. *Richmond v. Woodard*, 32 Vt. 833; *Weed v. Abbott*, 51 Vt. 609; *Banks v. Smith*, 5 Allen, 413; *Smith v. Messer*, 17 N. H. 429; *State v. Bates*, 36 Vt. 389; *Buckman v. Ruggles*, 15 Mass. 180.

The value of property is what it will bring in money on a fair average sale in the locality where it is to be appraised. The value to be set in a grand list to make it legal is not the exact value that the unqualified and uninformed judgment of one man would place upon the separate articles going in to make the list, but is the value that the whole board of listers, after full consul-

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tation with all the knowledge they can severally bring to bear, agree in good faith to place upon it; and the legislature is so careful to secure an equal average appraisal throughout the State that it has established the county and the state equalizing board with authority to increase or reduce the valuation of each town or county as shall seem necessary to make the results equal; and the case shows that this appraisal of real estate of which the plaintiff complains, because too low, was reduced still lower by the State equalizing board. The only result of appraising it higher in the first instance would have been to necessitate a larger reduction by the averaging committees. *Wilson v. Seavey*, 38 Vt. 321; *Henry v. Chester*, 15 Vt. 460; *Spear v. Braintree*, 24 Vt. 414; *Macomber v. Center*, 44 Vt. 237; *Houghton v. Hall*, 47 Vt. 334; *Watson v. Princeton*, 6 Met. 600; 21 Pick. 78; 43 Conn. 312; 17 N. H. 427.

The opinion of the court was delivered by

ROYCE, J. There were many exceptions taken upon the trial, but we shall only consider those that have been insisted upon in this court. It is insisted in the first place that the defendant was ineligible to the office of constable and collector of taxes at the time of his election at the March meeting in 1880. On the 1st day of April, 1879, and for several months thereafterwards, the defendant with his family resided in the town of Morgan, and his poll, personal property, and some real estate were set in the grand list of that town for that year. In July, 1879, he removed to Brownington with his family, and has since resided in that town. The defendant owned real estate in Brownington in 1879, which was set to him in the grand list of that town for that year, and was an inhabitant of that town at the time of his election.

The act approved Nov. 11th, 1869, G. S. page 1036, defining who shall be voters in town meeting, provides that "every male citizen of the age of twenty-one years whose list shall have been taken in any town or city at the annual assessment next preceding any town or city meeting shall, during their residence in such town or city, be legal voters in town meeting." One of the officers which towns are required by sec. 2658, R. L., at the annual

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town meeting to choose from among the inhabitants thereof, is a constable and collector of taxes. It is claimed that the test of eligibility is the qualification to vote in the meeting at which the officer is elected. The defendant, being an inhabitant, had the undoubted right to vote if he had such a list at the annual assessment next preceding that meeting, as is required by the act of 1869. The terms "list" and "grand list," as they are used in our statutes, mean a schedule of the polls and ratable estate of the inhabitants upon which taxes are to be assessed. A list that only represents real estate answers the requirement of the statute as fully as would a list that represented the poll and personal property. It is obvious that the intention of the law was to allow such persons as are subject to taxation in towns and are residents therein to vote in the annual meetings of such towns. The defendant, being an inhabitant of the town of Brownington at the time of his election, and having a list in said town upon which he was subject to be taxed, was eligible to the office to which he was elected.

The ground of the second exception is that there was no competent evidence that the defendant was sworn as required by No. 58 of the laws of 1872. The law requires that constables, grand jurors and listers, before entering upon the duties of their offices, shall be sworn to a faithful discharge of the same, and the town clerk is required to make a record thereof. The only record evidence offered to establish the fact of the defendant's having been sworn was a copy of the record of his election, in which the word "sworn" appeared immediately after his name. In section 14 of chapter 1, R. L., title, "Construction of Statutes," it is said that the word "sworn," when applied to public officers required by the constitution to take certain oaths, shall refer to those oaths; and when applied to other officers it shall mean sworn to the faithful discharge of the duties of their offices before a person authorized to administer oaths. Applying that construction to the word "sworn" as it occurs in this record, it does appear that he was sworn as the law required.

Under the law of 1872 listers are required to be sworn in the same manner as constables; and it was held in *Day v. Peaslee*, 54

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Vt. 310, that in the case of listers it was not necessary that the oath taken by them should be recorded, and that it was no part of their duty to procure such record to be made; and in *Blodgett v. Holbrook*, 39 Vt. 336, that it was competent to prove by parol that the listers were sworn to the truth of the certificate appended to a grand list.

It is claimed that the neglect of Wyman, who was elected constable in 1878, to give such a bond as the law required occasioned a vacancy in the office. It was held in *Weston v. Sprague and Edmunds*, 54 Vt. 395, that when one is elected constable it is the duty of the selectmen first to move in the matter and require a bond, fix its amount and the kind of security; so whether the security that was given by Wyman answered the requirements of the law or not, the office would not become vacant until further security had been demanded by the selectmen.

The objections that were made to the admissibility of the copies of the warnings and proceedings of the March meetings in 1874 and 1878 for the purpose of showing the election of constable and listers for those years, were properly overruled; and what has been said as to the evidence which those records furnished of the qualification of those officers need not be repeated. The lists which were put in evidence, we think were admissible. They were *prima facie* legal without being validated by the legislation of 1878 and 1880.

Conceding that it was allowable to show how the listers appraised the property and made up the lists, the more important question arises upon what is shown as to the manner in which they were made up. It is evident that the listers did not comply with the law in the ascertainment and appraisal of the real and personal estate, and in neglecting to set in the list \$500 in money that should have been set to a ratable inhabitant. It does not appear that any intentional wrong or fraud was attempted by the listers, but such errors as were committed by them were errors of judgment. The question presented is whether such errors invalidate a list as a basis for the assessment of taxes so that a collector cannot justify under a warrant commanding him to collect them. In *Henry v. Chester*, 15 Vt. 460, it was held that a list

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would not be rendered void by any error of judgment in the listers; and in *Spear v. Braintree*, 24 Vt. 414, that where errors and defects in a list are accidental or *bona fide*, it will not render the list void as a basis of taxation. This court has always upheld the validity of lists as bases for taxation where it has appeared that they were made in good faith and the only errors complained of were the result of mistakes in judgment on the part of the town officers. Any holding that should require of the listers a strict and technical compliance with all the requirements of the law in the making up of lists would invalidate most that have been made in the State, and upon which all the State and municipal taxes have been assessed and collected for many years. The tax payers have a remedy against the officers of the towns for any neglect of official duty that operates to their injury, and they should be remitted to that remedy when there is no fraud shown in the making up of the list. To require the rule that is claimed by the plaintiff would render it impracticable if not impossible to make lists upon which taxes could be assessed and money procured to carry on the State government and pay the necessary expenses of the various municipalities in the State. It is said in *Cooley on Taxation*, p. 154, to have been decided in a number of cases that accidental omissions from taxation of persons or property that should be taxed, occurring through the negligence or default of officers to whom the execution of the taxing law is entrusted, would not have the effect to vitiate the whole tax. The execution of such laws is necessarily entrusted to men, and men are fallible,—liable to frequent mistakes of fact and errors of judgment. If such errors on the part of those who are attempting in good faith to perform their duties should vitiate the whole tax, no tax could be collected.

The judgment is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTY OF ORANGE,
AT THE
MARCH TERM, 1883.

PRESENT :

HON. HOMER E. ROYCE, Chief Judge.

HON. JONATHAN ROSS,
HON. H. HENRY POWERS, } ASSISTANT JUDGES.
HON. RUSSELL S. TAFT,

HAZEN CAMPBELL v. DANIEL TARBELL AND OTHERS.

Injunction. Damages.

The plaintiff had recovered judgment against the defendant ; execution had been issued, which expired August 12th, 1876, and was returned to the court on that day. On the 9th day of August, 1876, the defendant brought a bill in chancery : "To enjoin and strictly forbid the said Hazen Campbell . . . his agents, &c., from proceeding further in the collection of the said execution," &c. The injunction was : "The said Campbell, &c., . . . are strictly enjoined and prohibited from proceeding further in the collection of the said execution," &c. The injunction was made conditional upon the filing of a bond by the defendant. The bond was filed August 12th ; the injunction was served on the present plaintiff August 24th, and on the sheriff, who held the execution, September 13th, all of the same year. It did not appear that the plaintiff or sheriff knew of the injunction until it was served. No alias execution was taken out. In an action on the bond, *Held,*

1. That the injunction enjoined the enforcement of the judgment, not the execution that had already run out.

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2. In deciding whether there has been a breach of an injunction, it was important to observe the objects for which the relief was granted.
3. The plaintiff was entitled to recover to \$215,—the value of wood and lumber, which he was, clearly, prevented from selling by the injunction ; but not for wood so situated that it could not have been discovered by reasonable diligence, or without *great energy*, or, where an officer would not be negligent if he failed to seize it on execution.

DEBT on injunction bond. Heard on the report of a referee, December Term, 1881, POWERS, J., presiding. Judgment for the plaintiff to recover \$531.70. The referee found that it did not appear that the plaintiff, or sheriff who held the execution, knew of the injunction until it was served ; that the prayer of the bill was :

“To enjoin and strictly forbid the said Hazen Campbell and the said Luke Parish, and their confederates, agents and attorneys, from proceeding further in the collection of said *execution*, issued upon the judgment, etc ;”

that the injunction was :

“The said Campbell and Parish, their agents and attorneys are strictly enjoined and prohibited from proceeding further in the collection of the said *execution*, in favor of the said Campbell against said Tarbell,” etc. ;

that the condition in the bond was :

“Whereas the chancellor has on application of said Daniel Tarbell said Campbell enjoined and restrained said Campbell from prosecution and further collection of an *execution*, &c. ”

The referee reported, in part :

There were also a few scattering logs that I find were included in the levy that plaintiff was prevented from selling by the injunction, which belonged to Tarbell, and I find the value to be fifteen dollars, which is a proper item for damage in this suit.

In regard to the sawed lumber remaining after the sale of the 15,000 feet to plaintiff. It was claimed by the defendant, Tarbell, that he did not own the same or all of it. He gave evidence to show that he had the winter before sold a large amount of lumber to his son, Luke Tarbell, and that the most of the lumber in the vicinity of the mill and mill-yard, at the time of the levy was this lumber ; but as the said Luke Tarbell had never removed or taken possession of this lumber, I find that it belonged to the defendant, Tarbell, and was liable to the said levy. It was in evidence, that there was other lumber, including a barn frame, and other kinds that belonged to said Tarbell ; and I find that the said Tarbell had twenty-five thousand feet of lumber, that was levied upon (after all deductions), that the injunction prevented the sale of ; worth

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two hundred dollars, and interest added, makes \$251, which the plaintiff is entitled to have considered in estimating his damages in this suit.

The plaintiff also claims, and proof was offered to show, that in the following winter and spring a large amount of wood was sawed by J. M. Smith and A. P. Smith, which belonged to said Tarbell, that he, plaintiff, might have seized, had he not been enjoined. This wood was manufactured after the levy, and of course was not included in it; but the plaintiff claims he might have had a chance to have seized it, if he had not been enjoined.

I find in regard to this that the said Smiths and one Bickford were sawing wood for defendant, Tarbell, at or near the railroad station at East Granville, and at one time there was of this wood lying in the sheds and the yard, some one hundred and fifty to two hundred cords, worth about three dollars per cord. The teams were drawing the wood in the logs and in four-foot wood from the mountain about as fast as the sawyers sawed it, and it was being taken away along as needed by the railroad company, so it became hard to tell what particular quantity there was there in Tarbell's possession at any particular time. Tarbell claimed that all this wood was in possession of the railroad company from the time it arrived on the ground, when it was sawed; and to establish this offered in evidence a certified copy of a lease from himself to the railroad company of the ground on which this wood was sawed, and on which most of it was after it was sawed, until removed by the railroad company. The copy of the lease was admitted, and after describing the land leased, which embraced the land on which the wood lay, had the following condition or reservation, viz.: "reserving, however, to myself all privileges of said yard for wood, and the piling of logs and wood, not necessary for said railroad to use for piling wood and logs bought of said Tarbell, or such other person as said Tarbell may direct; and it is agreed that such person shall not be on any part thereof, subject to any other person without said Tarbell's consent."

It did not appear what said Tarbell's contract with the railroad company was, in regard to this wood, nor did it appear that any of said wood had been measured and accepted by the railroad company at any time while the injunction was pending.

I find from the above facts that the said Tarbell was in possession of the wood, and the owner thereof, and that there were times during the pending of said injunction, when Campbell might have secured something on wood at this point, as it was passing through the mill, provided he discovered such chance. In other words, had it not been for the injunction, he might have caught something "on the wing," but to say what this chance was worth to him, and how much he lost by it, is quite difficult. He might by great energy have seized some wood at some time, and he might not. The proof did not show that he at any time became informed of any chance so to do. In actions of this kind, I take the rule to be for the triers, not to audit the value of specific pieces of property the plaintiff might have seized upon during the pendency of the injunction, but to say, taking all the circumstances into consideration, how much the plaintiff was damaged by it; what were his probable chances worth on this property. Adopting this rule (and not from finding at any particular time wood there that the plaintiff had knowledge of, and would have levied on but for the injunction), I find that the plaintiff was damaged two hundred dollars, or in other words, I find that he might have secured that amount on that wood, in the process

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of manufacture, had he not been enjoined from so doing, but refer the whole question of law to the court. If the above item of \$200 is to be allowed, interest should be added, making the whole sum \$251."

The other facts are stated in the opinion.

Perrin & McWain, for the defendants.

The damages must be the natural and proximate consequence of the injunction; and the liability is to be determined by the words of the injunction and bond, and will not be construed to extend beyond the terms and conditions thereof. *Sedgw. Dam.* 489, n. A surety is not to be held beyond the precise terms of the contract. *Bank v. Root*, 2 Met. 566; *Boston H. & M. Co. v. Messenger*, 2 Pick. 235; *Wright v. Russell*, 3 Wilson, 535; *Meyers v. Edge*, 7 Term, 254; *Strange v. Lee*, 3 East, 490; *Miller v. Stewart*, 9 Wheat. 680; *Kerr Inj.* 70; *State Treasurer v. Mann*, 34 Vt. 376; 1 New Rep. 41; 11 N. Y. 598; 38 Eng. L. & Eq. 57; 62 Barb. 354.

In an action on a bond, given on obtaining an injunction restraining the plaintiff's action at law on a promissory note, interest on the note, during the pendency of the injunction was held recoverable only. *Derry Bank v. Heath*, 45 N. H. 524; *Sedgw. Dam.* 489; *Ib.* 693. The damages found are too remote. *Center v. Hoag*, 52 Vt. 401; 10 Cush. 177; 9 Cush. 318; 48 Vt. 619; 10 Iowa, 337; 34 Iowa, 116; 51 Ill. 328; 31 Barb. 158; 21 N. Y. 99.

N. L. Boyden and *C. W. Clark*, for the plaintiff.

The injunction was against the *judgment*, and not merely the execution. *Kerr Inj.* 693; *Howe v. Willard*, 40 Vt. 654; *Stimson v. Putnam*, 41 Vt. 238.

A party enjoined from doing any act is not allowed to practice any subterfuge to escape obedience, but is required to act in perfect good faith with the court, and with the opposite party. 1 L. R. Eq. C. 42.

So that by this injunction, until it was dissolved, these plaintiffs were prevented from making use of any process of the court to collect the money on the judgment. *Bullen v. Ovey*, 16 Ves. 144;

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Merrick v. Bailey, 2 Sim. & St. 577; High Inj. s. 1444; *Mead v. Norris*, 21 Wis. 310. Damages correctly assessed. 10 Rich. (s. c.) 160.

The opinion of the court was delivered by

ROYCE, Ch. J. The allegations in the bill brought by the defendant Tarbell against the plaintiff upon which he predicated his claim for relief were, that the plaintiff had obtained a fraudulent judgment against him, and that he had offsets against that judgment which he had been fraudulently prevented from making. The plaintiff had taken out an execution upon said judgment which was, on the 9th day of August, 1876, in the hands of Luke Parish, a deputy sheriff, for collection. The prayer of the bill, as far as relates to an injunction, was that the court should enjoin and strictly forbid the defendants and their confederates, agents and attorneys from proceeding further in the collection of the execution issued upon said judgment.

The chancellor to whom said bill was directed on said 9th day of August granted an injunction enjoining and forbidding the defendants, their confederates, agents and attorneys from proceeding further in the collection of said execution. Said injunction was made conditional upon the filing of a bond by the defendant Tarbell according to the rules in chancery; and the bond in suit was filed with the clerk of the Court of Chancery, to which the bill was made returnable, on the 12th day of August, 1876. The condition of the bond, after stating that the injunction was granted upon the application of Tarbell and reciting it, provides that if the said Tarbell shall well and truly pay all intervening damages occasioned by delay to said Campbell in case it shall prove that said injunction is improperly granted, then this obligation to be null and void, but otherwise in full force. The injunction was served on the said Parish on the 24th of August, 1876, and on the plaintiff on the 13th of September, 1876; and was in force from the time of its service until the December Term of the Orange County Court, 1877. The execution mentioned in said injunction was dated the 13th of June, 1876, and made returnable in sixty days; and on the 12th day of August, 1876, (the last day of its life),

it was returned to the clerk of the court from which it issued with the officer's return thereon. While the execution was in Parish's hands, he had levied the same upon Tarbell's property and had sold a portion of it, and some which was covered by the levy had not been sold when the execution was returned. The plaintiff did not take out an alias execution or institute any other proceeding to enforce the collection of said judgment pending said injunction, and seeks to recover in this action the loss sustained by him in consequence of its having been granted.

The right of the plaintiff to recover is resisted upon the claim that the obligation of the defendants, evidenced by the injunction and bond, does not cover the damages or losses which it is found the plaintiff sustained ; so that the first question to be determined is the construction to be put upon these instruments.

The purpose of the bill upon which the injunction was granted was to avoid the judgment upon which the execution issued ; and unless the injunction is construed as enjoining the enforcement of that judgment during its pendency, the obtaining of it was an idle and useless ceremony. The orator did not need to have the collection of the execution which had been issued enjoined, because it had run out when the injunction was served, and no beneficial purpose was served by the giving of the bond in suit.

It is evident to us that it was understood by the chancellor, the party who applied for the injunction, and the defendants who joined with him in the execution of the bond, that the injunction was operative to prevent the institution of any proceedings to enforce the judgment. This was the intention of the parties to the transaction ; and it was said by Lord MANSFIELD in remarking upon the obligations of sureties in *Barclay v. Lucas*, 1 T. R. 291, that in questions upon intentions we must look at the subject-matter of the contract. The violation of the spirit of an injunction, even though its strict letter may not have been disregarded, is a breach of the mandate of the court. *Grand Junction, &c. v. Dimes*, 17 Sim. 38. In the case of *Partington et al. v. Booth et al.*, 3 Merivale, 148, it was held that where the defendant had been enjoined from taking possession under a verdict obtained by him in an action of ejectment, and the costs had been taxed, and a

writ of possession executed before the issuing of the injunction, it was a breach of the injunction to procure an attachment for the non-payment of the costs. In deciding whether there has been a breach of an injunction it is important to observe the objects for which the relief was granted, as well as the circumstances attending it. *Loher v. Arnold*, 15 Jur. 117.

Considering those objects and circumstances, any attempt to collect the judgment while the injunction was in force would have been a breach of it, and subjected the party making it to punishment for contempt. A party will not be permitted to do indirectly what he has been prohibited from doing directly. The injunction being operative to that extent, the bond given by the defendants was a valid and binding obligation to secure the plaintiff against loss that he might sustain in consequence of its being granted.

The remaining question is whether, upon the findings of the referee, the plaintiff has sustained loss which is recoverable in this action. It is found that the plaintiff was prevented from selling the wood, which the referee has found was worth \$15, and the lumber, which was worth \$200, by the injunction, and there can be no question but what those items should be allowed. The facts found in relation to the last item of \$200 do not, in our judgment, furnish a basis upon which it can be held as a matter of law that the damages represented by that item are compensatory. The burden of proof was upon the plaintiff to show that Tarbell not only had the wood, but that it was so situated that by the use of reasonable diligence it might have been discovered, so that an officer holding an execution might have levied upon it. No such facts were shown; but on the contrary it is found that it would have required *great energy* to seize any of it. The facts found would probably have excused an officer holding an execution for neglect to make a levy. The damages thus shown are too remote and conjectural to constitute a cause of action.

The judgment of the County Court is reversed, and judgment rendered for the plaintiff to recover the two first items, as found by the referee, and interest.

TRUSTEES OF BRADFORD ACADEMY v. A. A. W. GROVER.

[IN CHANCERY.]

Will. Legacy. Interest.

1. The will contained this clause: "I give and bequeath to my daughter,———one thousand dollars, to be paid on her marriage or when she arrives at age, with interest after, at her option." The will was executed in 1848; the legatee attained her majority in 1849, and was married in 1853; the testator died in 1854. *Held*, that the legacy drew interest as soon as the daughter arrived at age.
2. The legacy bears simple interest; and the payments should be applied when made first, to extinguish the interest, and then the principal sum.
3. R. L. s. 1897, as to computing interest, construed.

BILL IN CHANCERY. Heard on the report of a special master, June Term, 1882. POWERS, Chancellor, found due on the legacy the sum of \$1475.34, and decreed that this amount should be paid the defendant. The only questions were as to when the legacy was payable and the computation of interest. The facts are stated in the opinion.

Farnham & Chamberlin, for the orator.

Gilbert A. Davis, for the defendant.

The opinion of the court was delivered by

Ross, J. I. The first question arises on the proper construction to be placed upon the fifth clause of the will of Moses Chamberlin. That clause is as follows: "I give and bequeath to my daughter, A. A. W. Chamberlin, one thousand dollars to be paid on her marriage or when she arrives at age with interest after, at her option." The will was executed August 19, 1848. The testator died December 7, 1854. The legatee, the present defendant, attained her majority September 2, 1849, and was married Octo-

ber 20, 1853. The legacy was made a charge upon the home farm of the testator, which, charged with the payment of this and other legacies, was bequeathed by the testator to a son, as residuary legatee. The contention is in regard to the time when, by its terms, the legacy began to draw interest. The orator contends that it did not begin to draw interest until one year after the decease of the testator. It is true that the will was ambulatory, until the decease of the testator; and that, ordinarily, legacies do not draw interest until the end of the year after the decease of the testator, allowed by law for the settlement of the estate. This general rule may be controlled by the express provisions of the will. The testator may make the legacy consist of interest on a principal sum as well as the sum itself. The declared intention of the testator controls, in respect to interest, as well as all other matters. The residuary legacy to the son renders it manifest that the will became operative, in some respects at least, when made. All its provisions are more consistent with a then settlement and disposal of the testator's property, rather than a disposition of the same that was to take effect only at his decease. The legacies to the other daughters are "with interest." The language of the bequest in contention clearly imports that the legacy is to bear interest. The natural meaning of the expression, "with interest after," is, that interest shall be reckoned on the sum named, after the occurrence of one of the two events named as the time when the principal sum was to be paid. This clause stands in the sentence nearer to, and is more closely connected with, "when she arrives of age," than "on her marriage." The general rules of grammatical construction would make it a modifier of the former rather than the latter phrase. The time of the happening of the former event was certain and definite, and of the latter indefinite and might never come to pass. It is not reasonable to suppose that the legacy was to be without interest, if the legatee should never marry. The testator had made no other provision for her support after she arrived of age. It would be natural that he should provide that she should have the interest on the legacy from the earliest time at which she had the option to demand its payment, that is, when she attained her majority unless she should

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sooner be married. The other legacies of the same amount to the testator's other daughters are "to be paid with interest" on their marriage, or within one year from the date of the will at the option of the legatees. These legacies evidently are on interest at the expiration of the year after the execution of the will. The defendant arrived of age in about one year after the execution of the will. The construction we have given this bequest in regard to interest places the three daughters, who received the same sum, on practically the same basis in regard to interest. We think the defendant is entitled to interest on her legacy from the time she attained her majority September 2, 1849. This construction is in harmony with the language of the bequest, and with all the other provisions of the will.

II. The second contention is in regard to the proper method of computing interest upon the legacy, there having been made numerous payments thereon. By the language of the bequest the legacy bears simple interest only. It is a well-settled rule in regard to the application of payments, both at law and in equity, that when no application is directed, and no application made by the parties, payments are to be applied first to the extinguishment of the non-interest-bearing portion of the debt, if any, and then to the interest-bearing portion of the same. This rule requires that payments made on a debt bearing simple interest shall first be applied to the extinguishment of the interest due at the time they are made, respectively, and the balance thereof to the extinguishment of the principal sum. It is equally well settled, that when the principal sum bears simple interest the application of payments is not to be made in such a manner that interest will be computed upon interest. This is the substance of the rules applicable to the application of payments to overdue debts, bearing simple interest, both at common law and as embodied in the rules of this court, as found in 1 Aik. R., and as expressed in the statute of 1866, R. L. s. 1997. We think this statute is not confined by its terms to negotiable promissory notes and bills of exchange, as contended by the orator, but includes and is applicable to all contracts for the payment of money, where the kind of interest is ex-

pressed in the contract itself. But if the contention of the orator on this point should be upheld, the general rules at common law for computing interest and applying payments would apply, and be those we have already indicated. The law always applies payments as of the date when made. The very idea of a payment is an extinguishment of the debt on which it is made, at the time it is made, *pro tanto*, and the law always treats them as such. There is no valid ground for the contention of the orator that interest shall be cast on the debt, regardless of the payments, until the time of settlement or judgment, and that interest shall be cast on the payments from the time they were respectively made until such settlement or judgment, and then the latter be applied in reduction of the amount of the former. Such a computation makes no application of the payments when made, but aggregates them as one common payment at the time of the settlement. Applying the rules already stated to the computation of interest on the legacy in contention and the payments made thereon, only the first payment is sufficient in amount to liquidate the interest due on the legacy when the payment was made, and hence only the first payment operates to reduce the principal of the legacy. All the other payments are absorbed in paying the interest due on the legacy at the time of each payment, and leave a portion of the interest still unpaid, and unproductive to the defendant. The defendant's computation is in accordance with these rules and is correct.

The decree of the Court of Chancery is affirmed and cause remanded to that court to be perfected.

Abbott v. Chase.

C. E. ABBOTT v. B. B. CHASE.

Book Account. Jurisdiction.

In an action of book account an account of materials delivered in payment of a note, and accepted in payment, thereby extinguishing the note, cannot be used to increase the debtor side of the plaintiff's book beyond \$200 so as to give the County Court jurisdiction, although the suit is brought in good faith to that court.

2. R. L. s. 821, jurisdiction; s. 822, matter in demand, construed.

BOOK ACCOUNT. Heard on auditor's report and motion to dismiss, December Term, 1882, (ROWELL, J., being disqualified), by the two assistant judges of the County Court. Cause dismissed for want of jurisdiction. The case is stated in the opinion.

Perrin & McWain, for the plaintiff.

The debtor side of the plaintiff's book, where there has been no settlement and balance passed to new account, has always been held to be the criterion of jurisdiction. *Gibson v. Sumner*, 6 Vt. 163; *Stowe v. Winslow*, 7 Vt. 538; *Nichols v. Packard*, 16 Vt. 91; *Spear v. Peck*, 15 Vt. 566; *Beach v. Boynton*, 26 Vt. 105; *Mason v. Potter*, 26 Vt. 722; *Mason v. Hutchinson*, 32 Vt. 780; *Hodges v. Fox*, 36 Vt. 74; *Southwick v. Merrill*, 3 Vt. 320; *Reed v. Talford*, 10 Vt. 568; *Eddy v. Norton*, 27 Vt. 285.

Southwick v. Merrill, was an action of debt on a judgment of \$563.50, which had been reduced by actual payment and endorsements, concerning which there was no dispute, to \$49.64.

N. L. Boyden and *Wm. H. Nichols*, for the defendant.

If the writ upon its face shows that the County Court has jurisdiction, the cause will be dismissed on motion whenever upon trial it is evident that it has not jurisdiction. *Southwick v. Merrill*, 3 Vt. 320; *Miller v. Livingston*, 37 Vt. 467; *Scott v. McDonough*, 39 Vt. 203; *Hodges v. Fox*, 36 Vt. 74.

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After the note was paid and extinguished there is only about sixty dollars of plaintiff's account, including interest; and what he paid to extinguish the note is improperly charged on book, and cannot aid plaintiff to maintain jurisdiction. *Stevens v. Tuttle*, 3 Vt. 519; *Slasson v. Davis*, 1 Aik. 73; *Southwick v. Merrill*, 3 Vt. 320; *Miller v. Livingston*, 37 Vt. 467; *Scott, et al. v. McDonough*, 39 Vt. 203. And good faith will not aid the plaintiff. *Hodges v. Fox*, 36 Vt. 74; *Fassett v. Vincent*, 8 Vt. 73; *Field v. Randall & Durant*, 51 Vt. 33.

The opinion of the court was delivered by

Ross, J. The single question presented for consideration is, whether the County Court had original jurisdiction of the action. To give it such jurisdiction the debtor side of the plaintiff's account must exceed two hundred dollars. R. L. ss. 821 and 822. The plaintiff presented an account the debtor side of which amounted to \$278.54. But it is found by the auditor that when the account commenced the defendant held a note against the plaintiff for \$225; and that before any of the items of account accrued, the parties entered into a contract by which the work and materials first charged, and to the amount of the note, were to be performed, delivered and "applied in then present payment of the note." The auditor further finds "that the plaintiff did furnish material and do work under said contract, and that they were accepted by the defendant in then present payment of the note, and thereby the note was paid and extinguished." Under this finding the first items of the plaintiff's account were payments upon the note at the time they severally accrued, and no indebtedness was thereby created from the defendant to the plaintiff, nor did any right arise therefrom to the plaintiff to charge such items in account to the defendant. In determining the jurisdiction of the County Court on the facts found by the auditor, that part of the account presented by the plaintiff, which first accrued to the amount of \$225, must be treated as having been made and received in payment of the note, and as having no existence as an account. The balance for which the plaintiff had the legal right to charge the defendant is not sufficient in amount to give the

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County Court original jurisdiction of the action. Hence, the County Court correctly dismissed the action for want of jurisdiction. This is in harmony with all the authorities cited by counsel on both sides. There is not a single case cited that conflicts with this holding ; and it would be an unnecessary labor to review the cases heretofore decided by this court on this subject. Under the decisions the good faith of the plaintiff in bringing his suit in the County Court cannot, on the facts of this case, aid the jurisdiction of the County Court. See the cases cited by the counsel on both sides.

Judgment affirmed.

TOWN OF WASHINGTON v. TOWN OF CORINTH.

Settlement of Pauper.

1. Under the pauper law, the requisite list of three dollars, and a continuous residence for five years, are both necessary to constitute a legal settlement.
2. Rule in construing statutes stated.
3. R. L. s. 2811, pauper law, settlement,—construed.

ASSUMPSIT for keeping a pauper. Heard on the report of a referee, December Term, 1882, ROWELL, J., presiding. Judgment for the defendant. The case is stated in the opinion of the court.

H. A. White, for the plaintiff.

The fact as found by the referee that Hiram Brown, the father of the pauper, in May, 1868, moved from Corinth to Bradford, and returned back to Corinth in March, 1869, did not interrupt the settlement. His ratable estate was in the list of Corinth during the years 1868 and 1869 ; therefore, in law his residence was there. *Town of Northfield v. Town of Brookfield*, 50 Vt. 62.

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J. K. Darling, for the defendant.

The residence must be *continuous*. *Lincoln v. Warren*, 19 Vt. 170; *Royalton v. Bethel*, 10 Vt. 22; *Monkton v. Panton*, 12 Vt. 250; *Jamaica v. Townshend*, 19 Vt. 267; *Hartford v. Hartland*, 19 Vt. 392; *Barton v. Irasburgh*, 33 Vt. 159.

The opinion of the court was delivered by

ROYCE, Ch. J. This action was brought to recover for the expenses incurred by the plaintiff in the support of a pauper, one Lucia A. Brown. The right of recovery is dependent upon the question whether the pauper, at the time of the incurring of the expenses, had a legal settlement in the defendant town. The settlement that it is claimed she had acquired in Corinth was a derivative one from her father, Hiram Brown. Subdivision four of chapter 135, R. L., provides that a person of age who resides in any town and who holds ratable estate in his own right, the percentage of the value of which, besides his poll, is set in the list of such town at the sum of \$3, or upwards, for five years in succession, shall gain a settlement in such town. It is under that provision that it is claimed by the plaintiff that Hiram Brown acquired a settlement in Corinth.

It is found that he held ratable estate in his own right in Corinth of the amount and for the time required by that provision, but that he did not have a continuous residence in that town for the term of five years; and before the five years had elapsed he moved from Corinth to Bradford. His removal was an actual one and with no intention of returning to Corinth; it was such an one as has always been held would interrupt a residence in the place removed from.

Under the act of 1817 a settlement could be acquired by a residence for seven years; and it was held in *Monkton v. Panton*, 12 Vt. 250, that to gain a settlement under that act the residence must be continuous and without interruption. In the construction of statutes one part must be construed by another; and to collect the legislative intention, the whole must be inspected; they are to be interpreted so as to give effect to all the words therein if such interpretation be reasonable, and neither repugnant to the pro-

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visions nor inconsistent with the objects of the statute. *Bank for Savings v. Collector*, 8 Wall. 495; *United States v. Bassett*, 2 Story, 389.

The word *and*, as it occurs in the statute, should be construed conjunctively; and when so understood, the evident purport of the statute is to require residence and the ownership of the required amount of ratable estate for the term of five years to confer a settlement. If the legislature had intended that a settlement might be acquired by the ownership of ratable estate irrespective of residence, some appropriate language would have been used to express that intention. Hiram Brown having no settlement in the defendant town, the pauper did not acquire a derivative settlement and the defendant was under no obligation to reimburse the plaintiff for the amount expended for her support.

The judgment of the County Court is affirmed.

ELISHA LILLIE AND OTHERS v. E. T. LILLIE AND OTHERS.

*1 Action on Injunction Bond. Damages. Report. Exception.
Action on Sealed Bond.*

- . The plaintiff having a life estate, the defendant a reversionary interest, in certain woodlands, the latter procured the former to be enjoined by injunction "from cutting down any timber, trees, or wood, standing or growing upon the premises, . . . or in any way disposing of the same (except what may be cut in a husbandlike manner for firewood and timber for fencing and ordinary repairs upon the premises)" and from committing waste or spoil. In an action on the bond, *held*, that the plaintiff was not merely restrained from committing waste; that he was prohibited from cutting timber for any purpose save those noted in the exception, although it would not be in violation of the rules of good husbandry; and that he was entitled to such damage as he may have suffered in not cutting such wood as he had a right to cut.
2. Either the report, or the exceptions thereto, must show that the rule adopted for computing the damages was not the true one, or the judgment below will not be reversed.

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3. The bond was sealed ; therefore, the action was properly brought in the names of the obligees, whether jointly entitled to the damages or not.
4. After several years the injunction was modified to *such cutting as did not constitute waste* ; but the plaintiffs forbore cutting for fear of violating the order. No damages after the modification could be allowed.
5. The taxable costs, disbursements, and counsel fees, in the main suit,—not the direct result of the injunction,—are not recoverable.

ACTION on injunction bond. Heard on referee's report, December Term, 1881, POWERS, J., presiding. Judgment for the plaintiff to recover \$139.36,—the sum first named, and disallowing all other sums. The bond was:

"Know all men by these presents that we Elhanan T. Lillie, Horatio Lillie . . . are held and firmly bound unto " (plaintiffs) . . . " we hereby bind ourselves . . . The condition of this obligation is such that whereas . . . Now if the said ——— the orators shall well and truly pay and indemnify the said defendants from all damages occasioned them by the granting of such injunction . . . and all such costs as may be awarded against them," &c.

Elisha Lillie, the orator, had a life interest in a farm in Randolph, consisting of one hundred and fifty acres. About sixty acres of this was woodland. It appeared that it was covered with an old growth of timber, some of which was decaying ; and that the plaintiff had been in the habit for many years of cutting out and selling some twenty cords each year. The other facts are stated in the opinion ; and, substantially, the injunction.

Perrin & McWain, for the defendants.

The injunction was only against the commission of waste. If the plaintiff was restrained, the wood is there now ; and the rule of damages is the difference between what it was worth *before*, and *after*, the injunction. *Derry Bank v. Heath*, 45 N. H. 524 ; *Sedgw.* 489, 693, n. 2 ; *Cummings v. Mudge*, 94 Ill. 186. The taxable cost and counsel fees are not recoverable. *Hall v. Corking*, 9 Pick. 404 ; *Probate Ct. v. Mathews*, 6 Vt. 269 ; 4 Taunt. 592 ; *Story Con.* 644, 678 ; 1 Term, 161 ; *State Tr. v. Mann*, 34 Vt. 372 ; *Sturgis v. Knapp*, 33 Vt. 486 ; 52 Vt. 401 ; 11 W. Va. 276 ; 1 D. Chip. 46 ; 10 Cush. 177 ; *Danforth v. Pratt*, 9 Cush. 318.

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N. L. Boyden, for the plaintiffs.

The damage on the wood was properly allowed. Cutting wood by a tenant for life is not necessarily waste. *Keeler v. Eastman*, 11 Vt. 298; 45 N. H. 524. The damage caused through fear of violating the injunction should have been allowed. *Kerr Inj.* 698; *House v. Willard*, 41 Vt. 654; *Stimson v. Putnam*, 41 Vt. 238. Also, the costs and counsel fees. *Edwards v. Bodine*, 11 Paige, 224; *Corcoran v. Judson*, 24 N. Y. 106; *McRae v. Brown*, 12 La. Ann. 181; 3 Cal. 216; 44 Ind. 393; 48 Me. 307; 25 Ill. 372; 83 Ill. 136. The suit is properly brought in the names of the obligees. 28 Cal. 539.

The opinion of the court was delivered by

Taft, J. This is an action of debt to recover damages upon an injunction bond. The bond was given in an equity suit in favor of the defendants against the plaintiffs to restrain them from cutting wood and timber upon the premises described in the bill. The plaintiff, Elisha Lillie, held a life estate in the land, and the other plaintiffs and the defendants held the reversionary interest therein. The plaintiffs were restrained from cutting down any timber, trees or wood, standing or growing upon the premises, or in any way disposing of the same (except what might be cut in a husbandlike manner for firewood, and timber for fencing and ordinary repairs upon the premises), and from cutting down for sale any saplings or green trees or other growing timber and wood, and from committing any waste or spoil whatever.

I. The defendants contend that Elisha Lillie was restrained from nothing but the commission of waste; but we think the injunction prohibited the cutting of wood and timber for any purpose save those named in the exception above noted. He could not cut any wood or timber not included in the exception, although such cutting would not be in violation of any of the rules of good husbandry or cause any damage to the reversionary estate. He is, therefore, entitled to such damages as he may have suffered in not cutting such wood as he had a right to cut, but was restrained from cutting by the injunction.

II. The defendants insist that the referee mistook the rule of damages applicable to the case; that he estimated them at what the wood was reasonably worth on the stump; that the wood was standing at the dissolution of the injunction, and could then have been cut. It is not apparent from the report what rule the referee did adopt. He reports some of the facts found by him and some of the evidence. No question is presented by the report in regard to the matter; no objection appears to have been made to the evidence, and no exception was taken to the report. The referee reports that: "The plaintiffs were damaged by being deprived from cutting what wood they might have cut from said land and what they would have cut had said injunction not been placed upon them." To justify us in reversing the case on this point, the rule adopted by the referee should have been shown by the exceptions, and that it was not the true rule.

III. The defendants claim that no recovery can be had in the names of the plaintiffs, upon the ground that they are not jointly entitled to the damages. The bond in question is a sealed instrument; and the general common-law rule is, that actions thereon must be brought in the name of the obligees, even in those cases where the conditions are expressed to be for the benefit of third persons. Actions of debt upon specialties are strictly legal actions brought to enforce legal rights. The legal estate in a specialty is in the party with whom it is made, and whoever is in interest under it may maintain an action for his benefit in the name of the party to it under whom such interest is claimed. In *Bird et al. v. Washburn et al.*, 10 Pick. 223, it was held that debt upon a bond executed to the plaintiffs to secure them in becoming bail for a prisoner, might be maintained by them as joint plaintiffs for the benefit of the one who had been obliged to pay. We construe the bond in question as joint, and think the action properly brought in the names of the obligees.

IV. The chancellor modified the injunction in 1874, and the plaintiffs thereafter were not restrained from cutting wood and timber unless such cutting would constitute waste; but they for

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bore cutting and selling for fear they might violate it. Whatever their belief may have been, they are entitled to no damages for not doing what the injunction permitted them to do.

V. The plaintiffs claim to recover the taxable costs, disbursements and counsel fees in the suit in which the injunction was granted. The bond requires the obligors to pay all damages occasioned by the granting of the injunction, and all such costs as may be awarded against them. We do not think this refers to the costs in the main suit, but to those accruing in consequence of the injunction as a direct result of it; such as the cost of the dissolution, if one was moved for and granted. This is the reasonable construction to be given the terms of the bond. All damages which accrue as the direct result of the injunction are recoverable. We do not say but that counsel fees, costs and disbursements may be included in such damages, but they must be such as result from granting the injunction; it is not necessary, however, to decide this question as none of the costs, disbursements, and counsel fees which the plaintiffs claim to recover, were incurred in consequence of granting the injunction, but were the legitimate expenses of defending the suit upon its merits, and cannot be regarded in any sense as damages occasioned by the injunction. That such items cannot be recovered has been decided in this State. *Sturgis et al. v. Knapp et al.*, 33 Vt. 486.

The exceptions of both parties are overruled, and judgment is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTY OF LAMOILLE,
AT THE
AUGUST TERM, 1882.

PRESENT :

HON. HOMER E. ROYCE, Chief Judge.
HON. JONATHAN ROSS,
HON. WHEELOCK G. VEAZEY, } ASSISTANT JUDGES.
HON. RUSSELL S. TAFT,

S. R. MILLER v. HIRAM MANN.

Deed. Words in "Land Adjoining," Construed.

1. A deed, conveying a hotel does not convey, by force of the words, "*and lands adjoining it, being two or three acres, more or less,*" a small island in a river back of the land on which the hotel stands.
2. One of the defendant's grantors, owning the land on both sides of the river opposite the island in question, deeded that parcel "on the westerly side of the" river. The main channel was on the easterly side of the island. *Held*, that the deed included all the land to the thread of the main channel, and, therefore, the island.
3. The description in a deed, commencing at a certain point on the river and only running around three sides of a piece of land to another point on the same river, closed with these words: "*meaning to convey all the land east of the said mentioned bounds that I own.*" The land was on the west side of the river, and the grantor owned to the river. *Held*, that the deed was not void for uncertainty.

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TRESPASS. Heard on the report of a referee, April Term, 1882, POWERS, J., presiding. Judgment for the defendant. The action was brought to settle the question of title to Spruce Island, so called, in the "north branch" of Lamoille river.

The plaintiff claimed title to the island by virtue of a deed executed to him by Henry Smilie, October 9th, 1875, the description of which is as follows:

"The hotel now occupied by S. R. Miller and the land adjoining the same, containing two or three acres, more or less . . . being the same land and premises which Moses McFarland conveyed to Francis Parks by deed dated July 6, 1875, and the same land which Francis Parks deeded to Henry Smilie, Oct. 7, 1875."

The defendant claimed that the title of the island was in George Mann by virtue of a deed executed to him October 16th, 1871, by the said Moses McFarland; and that the trespass complained of was by his direction. As to this the referee found:

"It was agreed that on October 16, 1871, the date of George Mann's said deed, Moses McFarland was the owner of the hotel property, the George Mann shop and land, the island, and claimed to own the Mary Johnson land on the west side. The land on the west side was conveyed to said McFarland April 25, 1867, by Mary Johnson; but the description of the land by reference is found in a deed from Erastus Chaffee to Nason Chaffee (one of said Mary's grantors), dated March 28, 1861, and is as follows: 'Commencing twelve feet north of D. C. Hurlburt's barn the south side of the road leading to my house, thence on the south side of the road running northerly to a stake and stone on the east side of said road near the brook, thence easterly to a stake and stone on the line between said land and land owned by Chauncey Warner, and formerly owned by Robert Herren, thence easterly to the branch, meaning to convey all the land east of said mentioned bounds that I own.'

"It will be noticed that this description stops at the branch, the lines not being traced back to the Hurlburt barn, the place of beginning. But no question was made as to said McFarland's title to the land on the west side of the west branch, and the referee has stated the description above in view of the defendant's claim that the island passed to McFarland thereunder and to George Mann from McFarland.

"After the deed to the defendant in October, 1871, McFarland continued to own and occupy the hotel property till he leased it to

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the plaintiff January 10, 1874. During that time from 1871 to 1874 he occupied as the hotel property all the land in the rear of the buildings to the branch, as shown on the plan, and to some extent the lower or Spruce island. He planted a few hills of tomatoes on the island for one or two years, cut a few bushes there and had all the possession of the island that anybody had during that time.

"After the plaintiff went into possession in 1874, till January, 1881, he has occupied the island to some extent—one year raising a few potatoes there and occasionally clearing off floodwood that lodged thereon. But the island is incapable of much occupancy of practical value. . . .

"In October, 1871, probably twice as much water ran in the east branch as in the west, and this relative size of the currents had existed for many years."

The description in the deed from Moses Chaffee to Rowell, dated January 4th, 1839, was as follows:

"All of that part or portion of lots number forty-five and forty-six which lies on the westerly side of the north branch (so called) of Lamoille river."

The trespass complained of was committed in January, 1881. Said McFarland executed a quit-claim deed of this island to the defendant, November 24th, 1880; and he also defended under this deed, if not protected by the George Mann deed. The other facts appear in the opinion.

M. O. Heath, for the plaintiff.

By a fair construction of the plaintiff's deed the description covers the island. Doubtful words are to be taken most strongly against the grantor. 2 Wait Act. & Def. 504. The construction ought to be such as will carry into effect the intention of the parties. 3 Wash. Real Prop. 333; *Colby v. Colby*, 28 Vt. 10. The words, "and the lands adjoining," are equivalent to the words, "all lands thereto appertaining." These last when connected with a grant of a house will pass all lands usually occupied therewith. The term, "messuage," in some cases includes not only the dwelling-house, but the curtilage, orchard, garden, &c. 3 Wash. Real Prop. 343. It is clear from the occupancy of the island by the plaintiff and his grantors that the intent was to

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convey it with the hotel. *Bailey v. White*, 41 N. H. 337; 35 Mo. 293. The deed under which the defendant claims is void for uncertainty. *Townsend v. Downer*, 23 Vt. 226; 41 N. H. *supra*. See also *Child v. Starr*, 4 Hill (N. Y.) 369; 14 Pa. 171; 56 N. Y. 526; 45 Me. 9; 22 Vt. 484; 3 Kernan, 296. The plaintiff was in possession; the defendant a mere stranger. See 39 Vt. 359; 24 Vt. 542; 2 Wait Act. & Def. 508; 7 Allen, 205.

H. M. McFarland and *Edson, Cross & Start*, for the defendant.

The deed from Erastus Chaffee to Nason Chaffee, dated March 28th, 1861, is not void for uncertainty. *Townsend v. Downer*, 23 Vt. 225; *Adams v. Warner*, 23 Vt. 395; *Lippett v. Kelley*, 46 Vt. 516; *Hull v. Fuller*, 7 Vt. 100; *Blake v. Doherty*, 5 Wheat. 359; 3 Pick. 348; 3 Wash. Real Prop. 342-351. A riparian owner owns to the middle of the stream. Angell Water Cour. (3 Ed.) 612; 3 Wash. Real Prop. 353; *Storer v. Fruman*, 6 Mass. 439; *McCulloch v. Aten*, 2 Ohio, 425; *Haudley v. Anthony*, 5 Wheat. 374; *Johnson v. Panuel*, 2 Wheat. 206. Boundary lines terminating on a stream continue to the *medium flum* of the main stream. 3 Kent Com. 348; *Perley v. Chandler*, 6 Mass. 554. Islands in rivers belong to the nearest shore. *Lunt v. Holland*, 14 Mass. 150; *Clermont v. Carlton*, 2 N. H. 369; *Grover v. Fisher*, 5 Green (Me.), 69. It is clear that George Mann obtained title to the island by the McFarland deed; because the main stream as found by the referee is and was, January 4, 1839, the east stream; because Spruce island is nearer the west than east shore. Spruce island did not pass as appurtenant to the hotel property; for land cannot pass as appurtenant to land. 22 Vt. 484, 588; 8 Allen (Mass.) 292; 7 Mass. 6; 28 Vt. 672; 36 Vt. 269; 2 Greenleaf's Cruise (1850 Ed.), 840.

The opinion of the court was delivered by

VEAZEY, J. The description of the land in the deed under which the plaintiff claims title is as follows: "The hotel now occupied by S. R. Miller, and the lands adjoining it, being two or three acres, more or less." The land in dispute was separated from the land on which the hotel stood by a river, the size of

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which is not given, but large enough for a mill stream. We are referred to no case and have found none where the term "lands adjoining," as used in the description, is defined. The river at this point had two channels, and the disputed land was a portion of a small and nearly worthless island between these channels, and separated from the land on which the hotel stood by the main channel. The plaintiff's grantor had subsequently to the plaintiff's deed conveyed it to the defendant. We do not think the words "land adjoining" are synonymous with "messuage" and "curtilage;" and if they were it would not aid the plaintiff, as these terms are not broad enough to take in this island, which was beyond the thread of the river. Neither did the island pass as appurtenant to the hotel property, because land cannot pass as appurtenant to land. *Buck v. Squiers*, 22 Vt. 484; *Ammidown v. Bank*, 8 Allen, 292.

It is also claimed that this expression, "lands adjoining," is equivalent to the expression, "and all lands thereto appertaining." The words "adjoining" and "appertaining" are not synonymous. As descriptive words in a deed, "adjoining" usually imports contiguity; "appertaining," use, occupancy. One thing may appertain to another without adjoining or touching it. Proof that pieces of land adjoin would not be proof that one appertained to the other. Neither in literal meaning, nor as used in deeds, are they equivalent. Under the rules of construction applicable to deeds, in an action of trespass, the term, "lands adjoining," was too indefinite to make the grant extend beyond the *medium filum* of the main channel of the river. The term cannot be construed literally, as there is no limit to adjoining land.

The defendant claimed title to the land in dispute, called Spruce island, from different sources. One was by deed of Moses McFarland, dated October 16, 1871, the description being by reference to a former deed, and being found in the deed of Erastus Chaffee to Nason Chaffee, dated March 28, 1861. As we understand the referee's report, the description in said last mentioned deed ran around three sides of a piece of land on the westerly side of the river in question, called the North Branch of Lamoille River, beginning at one point on the river, and running around to another

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point, and then instead of describing the fourth side by running on the bank of the river from the point last arrived at to the place of beginning, the description closed with the words "meaning to convey all the land east of said mentioned bounds that I own." As we understand the report, the grantor in that deed owned all the land east of the three lines described, to the river, and there was no question in reference to his ownership. The plaintiff claims this deed was void for uncertainty. That is held certain which is capable of being rendered certain, according to the maxim *id certum est, &c.* The fact of the grantor's ownership to the river made the description and the intent of the deed certain as to the extent of the grant. If he owned to the river he owned and conveyed to the thread of it, that is, the thread of the main channel. This would take in Spruce Island. See authorities cited in defendant's brief. The only doubt on this branch of the case arises from the fact that the main channel at some time changed from the branch westerly of the island to where it now is, easterly of the island; and we infer this was partially brought about by artificial means and not wholly by natural deposits and accretions. The description on which the defendant defends runs back to the deed of Catlin to Rowell, dated July 4, 1839, and the grantor then owned on both sides of the stream: If the east branch was then the main channel, it is plain that the island was covered by the description in that deed. The referee does not say when that change took place, but says, "many years past, say forty or more." Upon this finding and in the absence of anything to the contrary, we think we should solve the question of the location of the main channel at the date of said deed in favor of the grantees of Moses Catlin. Upon this view Geo. Mann obtained the title to this island about four years before the plaintiff's pretended title; and this makes a complete defence as the case stands, in reference to the defendant Hiram Mann and said G. H. Mann, and renders it unnecessary to notice the other grounds of defence.

The *pro forma* judgment of the County Court is affirmed.

ALEXANDER SLICER v. TOWN OF HYDE PARK.

[IN CHANCERY.]

Mortgage. Highway. Foreclosure.

1. A mortgagee of a farm is not entitled to a decree of foreclosure against a town of its interest in a highway, although it was laid through the mortgaged premises after the execution of the mortgage, the damages paid to the mortgagor, no notice given to the mortgagee, and the property worth less than the debt.
2. R. L. s. 2932, laying out highway, damages—construed.

PETITION to foreclose a mortgage. Heard on demurrer, December Term, 1881, POWERS, Chancellor. Demurrer sustained, and petition dismissed.

P. K. Glead, for the orator.

The highway is an encumbrance. *Butler v. Gale*, 27 Vt. 739. The act of 1856 only makes a highway no breach of the covenant, but does not affect its character as an encumbrance generally. The orator is entitled to his land, or the damages: *Jones Mort. ss.* 707–8. The bill contains a prayer for general relief, so that the court can decree money as damage.

Brigham & Waterman, for the defendant.

The mortgagee out of possession is not the owner of the land, and so not entitled to notice on laying the highway. 4 Kent Com. 160; 2 Greenl. Cru. Real Pr. 81, 96; 2 Wash. Real Pr. 155–6; *Hooker v. Wilson*, 12 Vt. 695; *Cooper v. Cole*, 38 Vt. 185. The mortgagor is the owner and so entitled to the damages. *Farnsworth v. Boston*, 126 Mass. 1; *Pond v. Eddy*, 113 Mass. 149; *Norwich v. Hubbard*, 22 Conn. 587; *Whiting v. New Haven*, 45 Conn. 304.

The opinion of the court was delivered by

Ross, J. This is a petition to foreclose a mortgage. The defendant demurs thereto. The substantial facts admitted by the demurrer are: that in 1871 the orator became the mortgagee of a certain farm in the defendant town by a mortgage from Levi F. Ricker; that while Ricker was in possession of the farm the selectmen of the defendant town, by agreement with Ricker, and without notice to the orator, laid out a highway across the farm; that Ricker afterwards sold to McAllister; that the orator foreclosed against McAllister and subsequent mortgagees, who did not redeem; and that the farm is worth less than the amount of the orator's mortgage debt. He prays for a bill of foreclosure of his mortgage against the town. The suit has at least the merit of novelty. The orator does not claim that the laying out of the highway was illegal and void; but admits by implication that a legal highway has been established across the farm, and asks to have the town redeem his mortgage or be foreclosed. Foreclosed of what? The town does not own the highway. A highway is an easement in the public, the right in the public to use the soil, the fee of which remains undisturbed in the owner, for passing and repassing thereon, and for such other purposes as highways are used. This right in the public is acquired by the exercise by the State of the right of eminent domain. The State exercises this right through the officers of the town as to highways wholly located within the town, and casts the burden of its exercise upon the town. The town, as such, acquires no easement or right in premises over which its officers agreeably to statute law lay out a highway. The town, through its officers, is but the hand of State in the establishment and maintenance of highways for the use of the public. The town owns nothing in the highways established by it. It is charged by the State with the duty of making and maintaining them. All that the town takes is this burden but no exclusive right, no right peculiar to its inhabitants over those of any other town or State, and for its inhabitants only the same right which the rest of the travelling public has. Although a highway is an encumbrance, the town in which it is located, though charged with the duty of maintaining it, does not own it, and has

Slicer v. Hyde Park.

nothing in it of which it can be foreclosed. These are elementary principles. Angell on Highways, ss. 301, *et seq.*

It is also elementary that a bill in chancery cannot be maintained when a party has full and ample remedy at law. Section 2932, R. L., provides the orator full and ample remedy for the injury complained of, if it was an injury to him, and if his interest in the farm at the time the highway was laid out was such that he was entitled to notice and compensation.

In any view of the case the decree of the Court of Chancery sustaining the demurrer and dismissing the bill was correct, and that decree is affirmed, and the cause remanded.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTY OF CHITTENDEN,
AT THE
JANUARY TERM, 1883.

PRESENT :

HON. HOMER E. ROYCE, Chief Judge.
HON. TIMOTHY P. REDFIELD, }
HON. JONATHAN ROSS, } ASSISTANT JUDGES.
HON. WHEELOCK G. VEAZEY, }

THOMAS MANN v. CENTRAL VERMONT RAILROAD CO.

Railroad Crossing. Negligence.

1. If a railroad company by its servants negligently constructs a crossing over a public highway, and a person without fault is injured in his property while traveling on the crossing by reason of a defect in it, the company is liable in an action to such person.
2. R. L. ss. 3131, 3132, 3133, penalty for obstructing travel, &c. ; 3377, 3383, railroad crossings, damages, construed.

TRESPASS on the case. Appeal from the City Court of Burlington. Heard on demurrer to the declaration, April Term, 1882. Demurrer overruled. The case was then heard upon the plea of the general issue by the court. Judgment for the plaintiff. The facts are sufficiently stated in the opinion of the court.

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Noble & Smith and *Roberts*, for defendant.

The towns are primarily liable for all injuries received by persons travelling lawfully on the highways. This obligation is imposed on the towns, and this court have, in the case of *Batty v. Duxbury*, 24 Vt. 162, confirmed this liability primarily in the towns, as between a railroad company which obstructs a highway and the town. *Barber v. Essex*, 27 Vt. 62. The company occupies a position of *secondary* liability. *Phillips v. Veazie*, 40 Me. 96; Redf. Railways, ss. 171-2, n.; *Brown v. Lent*, 20 Vt. 529; *Willard v. Newbury*, 22 Vt. 458; 24 Vt. 162; *Buck v. Conn. R. R. Co.*, 42 Vt. 370.

Hard & Safford, for the plaintiff.

1. The judgment on demurrer, not excepted to, finally determined the legal effect of the facts stated in the declaration. The subsequent plea of the general issue presented the cause for trial in the court below only upon the question made by a denial of those facts. No other question is before this court. 1 Chitty Pl. 472, 661; Gould Pl. 476, 477. The County Court found the facts to be as stated in the declaration, and upon them the plaintiff should recover. Wharton Negligence, ss. 157, 159, 164; *Teel v. Watson*, 47 Vt. 684.

2. Section 3383, R. L. does not preclude the plaintiff from enforcing his demand in this action, even if that question was properly before this court. *Dones v. Inhabitants*, 1 Allen, 182; Wharton on Neg. 969; *Gillet v. Western R. R.*, 8 Allen, 560; 1 Redf. Railways, 420.

The opinion of the court was delivered by

Ross, J. The findings by the County Court establish that, on the occasion complained of, there was a public highway in the city of Burlington which was crossed by a railroad, which the defendant was operating; that the crossing had been maintained by the defendant and its predecessors for more than ten years prior to the accident; and that the servants of the defendant just prior to the accident placed a plank between the rails at the crossing, negligently too far from one of the rails, whereby the plaintiff's horse

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was injured while being driven with due care along the highway over the crossing. It is not claimed that the defendant is not liable for the negligence of its servants in placing the plank in the crossing, if any liability was thereby incurred to the plaintiff by any one, except the city of Burlington. It is contended that, under the statutes and decisions of this State, the city of Burlington, if any one, is alone liable to the plaintiff for injuries sustained through the insufficiency of the highway at the crossing, and that the defendant's liability, if any, is to indemnify the city of Burlington. It is contended by the counsel for the defendant, that for anything appearing in the exceptions, it may be that the railroad was first constructed and the highway laid over it, in which case the city of Burlington and not the defendant would be bound as between the two to construct and maintain the crossing. R. L. s. 3381. Or, that, if the highway was first established, there may have been a contract between the railroad company and the city, whereby the latter was bound to keep the crossing in repair. If these contentions are true, it is then contended that there would be no obligation resting upon the defendant to indemnify the city if the latter were liable to the plaintiff. These contentions are manifestly inconsistent with the allegations in the declaration, and with the finding of the County Court. The declaration alleges that the railroad *crossed* the highway, and not the latter the former, in such a manner that it was the "legal duty of the defendant to keep and maintain the said crossing in good and sufficient repair for the accommodation, safety, and convenience of the public travel in said highway." The County Court has found that at the time of the occurrence the defendant was in the discharge of this duty, and its servants so negligently discharged the duty that the plaintiff was thereby injured. But if these contentions were true, it is not readily discernible how they would aid the defendant. The defendant's servants were there planking the crossing, either lawfully or unlawfully. In either capacity they represented the defendant. Does it aid the defendant that it was then through its servants, as an intermeddler, creating a nuisance in the highway? Is its position any better than

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it would be if there in the exercise of a right, but so negligently as to create a nuisance?

By the common law, any one who obstructed a highway to the special injury of the traveller was liable therefor. 1 Chitty Pl. 126; *Williams' Case*, 5 Coke, 78; *Elliott v. Concord*, 27 N. H. 204. "It is clearly agreed to be a nuisance to dig a ditch or make a hedge over-thwart the highway, or to erect a new gate, or to lay logs of timber in it, or generally to do any other act which will render it less commodious." 3 Bac. Abr. 37, (Highways, E.).

Our statutes have enacted the common law in this respect. R. L. ss. 3131, 3132, 3133. The first two sections prohibit, under penalties, the placing of any obstruction or nuisance in any highway so as to impede passing therein, and the last section renders the person guilty of so doing liable to the town or any individual for damages sustained in consequence of such acts. A corporation is a person, within the meaning of the statutes. R. L. s. 21. Hence, if the defendant created the obstruction or nuisance by which the plaintiff received the injury complained of without right, and unlawfully, it would be answerable therefor to the plaintiff under these provisions of the statute as well as at the common law. Under these statutes, is the condition of the defendant any better because it was charged with the duty of maintaining the highway at the crossing in good and sufficient repair, and that it so negligently performed that duty that plaintiff thereby sustained damages? We think not. The defendant under the statute laws of the State had the right to construct and maintain its railroad across the public highway. R. L. ss. 3377 to 3385. In doing so it assumed the duty of keeping the crossing in good and sufficient repair "for the accommodation, safety and convenience of the public travel on the highway." (S. 3383). At common law, whenever a right is conferred and a corresponding duty imposed upon a person or a corporation, it is answerable to a third person who sustains damages by the negligent discharge of such duty. The fundamental maxim of the common law underlying all questions of duty and negligence, *sic utere tuo ut alienum non lædas*, applies. Negligence is nothing more than a failure to discharge

the duty resting upon one under the circumstances of the case. Such negligence of an individual or a corporation is actionable in favor of the person to whom it occasions special damage. A different rule applies in regard to the failure of *quasi* corporations like towns, counties, &c., to discharge a public duty imposed by statute, where no liability is thereby expressly created. This distinction is clearly taken and announced by Ch. J. PARSONS, in *Riddle v. Proprietors of Locks & Canals, &c.*, 7 Mass. 169. In regard to railroad corporations the decisions of this court are explicit in holding them liable for damages sustained by this negligence in the exercise of a right or discharge of a duty. The cases of *Willard v. Newbury*, 22 Vt. 458, and *Batty v. Duxbury*, 23 Vt. 714, and 24 Vt. 155, assume that the railroad corporations were liable for the damages sustained by the plaintiffs from their respective failures to discharge the duties imposed by the statute; but hold that such liability did not release the towns from their primary duty to maintain their highways in a reasonably safe condition when sued by a traveller. In *Hatch v. Vt. Central R. R. Co.*, 25 Vt. 49, the judgment was reversed and cause remanded and retried, as found reported in 28 Vt. 142, on the express ground that the defendant would be liable to the plaintiff for any damages it caused him by negligently and carelessly constructing and maintaining its railroad near his premises, although the road did not pass over any portion of the plaintiff's premises. The town of Newbury was allowed to recover of the Conn. & Pass. Rivers R. R. Co. for the damages and costs sustained by it through the judgment of Willard against it, as is stated by Ch. J. REDFIELD in *Batty v. Duxbury, supra*. Hence, R. L. s. 3883, passed subsequently to that decision rendering railroads liable to towns for all damages and costs sustained by the latter, by the failure of the former to construct and maintain their crossings over highways, so that the same should be convenient and safe for the public travel on the highways, simply declared the law to be what this court had already decided it to be. It seems to have been enacted by the legislature *ex majori cautela*. It cannot be held to have intended to change the law so that the liability of the railroad companies would be to the towns alone. There was no attempt

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to modify ss. 3131 to 3133 then upon the statute, rendering railroads liable to any one who should sustain special damages by an obstruction or nuisance created by a railroad company in a highway. The provisions of s. 3383 are not inconsistent with the provisions of ss. 3131 to 3133, and hence did not repeal the latter by implication. *Barber v. Essex*, 28 Vt. 62, affirms the doctrine announced in *Willard v. Newbury*, and in *Batty v. Duxbury*. On these statutes and decisions there is no intention manifested to change the common law in regard to the liability of a railroad corporation for damages sustained by negligence in the discharge of its duty. This common law liability has been expressly held in a case almost identical in its facts, in *Gillett v. Western R. R. Co.*, 8 Allen, 560. But it is insisted that the decision in *Buck v. Conn. & Pass. Rivers R. R. Co.*, 42 Vt. 370, in substance, supports the defendant's contention that the railroad is only liable secondarily to the town. A careful examination of that case will show that it was an attempt to render the defendant liable for not building any crossing over a highway, which it had obstructed in constructing its railroad, and that the plaintiffs with the rest of the public had thereby been deprived from using the highway. It was held that the railroad company and the selectmen of the town, under the statute, were to determine when, how and where the crossing should be constructed, and that the defendant was not liable for mere nonfeasance in this respect. But the court were careful to say: "We have no occasion to consider whether a railroad company might not so obstruct a public highway that an action in favor of an individual injured by the obstruction would lie against the company." Neither on its facts nor on the decision as announced does that case support the defendant's contention. No good reason can be given why an individual who has sustained an injury by the negligence of a railroad company in maintaining a crossing over a public highway should be compelled to seek redress against the town which is also under a duty and liability to him to maintain the highway at that point in a reasonably safe condition, and then have the town recover the same damages with added costs against the railroad company. It is more consonant with justice and reason to hold that he should enforce his remedy

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directly against the party whose negligence has caused the injury, even if he might have a remedy also against the town. It is evident there may be cases where the railroad company would and ought to be liable to the individual when the town would not. Suppose the injury followed the creation of the obstruction or nuisance by the railroad company at so short an interval of time that the town had no notice of the same, nor opportunity to remove it, the railroad company might be liable while the town would not. The party injured, on the defendant's contention, would be without remedy in such a case, which would be most unjust.

Judgment affirmed.

PLATT AND OTHERS v. THE TOWNS OF MILTON AND COLCHESTER.

Laying Highway through two or more Towns. County Court has Jurisdiction.

1. The County Court under section 2969, R. L., has jurisdiction where the petition prays for commissioners to establish a highway extending *into two adjoining towns*, although no application had been made to the selectmen, and the laying the highway would require the building of a bridge over a river between the towns.
2. R. L., s. 2969, laying highway through two or more towns, construed.

PETITION for highway. Heard on motion to quash, September Term, 1882, TAFT, J., presiding. Motion overruled.

The petition prayed for commissioners to lay out a highway : "Beginning at or near the easterly terminus of the Sand Bar Bridge, . . . in said town of Milton, thence running southerly in said Milton through, &c., . . . thence crossing said river Lamoille by a bridge herein prayed for, to a point upon the

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opposite bank of said river on the land of Sherman McNall, in said Colchester; . . . thence continuing in said town of Colchester through the land of," &c. A motion to quash was filed, because it did not appear by the petition that any application had ever been made to the selectmen of either town, or that any action in respect to the highway had ever been taken by said selectmen.

Whittemore & Wheeler and *Roberts & Roberts*, for the petitioners.

Hard & Safford, for the defendants.

The opinion of the court was delivered by

VEAZEY, J. The petition prays for commissioners to be appointed to establish a highway extending into two adjoining towns. Its description is not limited to the crossing of a river by a bridge, but it describes an extended highway including as a part of it the crossing of a river between the two towns. Upon the face of the petition, the thing sought is a highway running into the towns, not simply "a bridge over a stream between the towns." The County Court, therefore, had jurisdiction under section 2969, R. L.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTY OF CALEDONIA,
AT THE
MAY TERM, 1883.

PRESENT :

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| HON. TIMOTHY P. REDFIELD, HON. H. HENRY POWERS, HON. WHEELOCK G. VEAZEY, HON. RUSSELL S. TAFT, | } | ASSISTANT JUDGES. |
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NATIONAL BANK OF ST. JOHNSBURY v. R. E.
PEABODY & CO.

*Judgment Void Rendered in Another State, None of the Parties
Residing There, When, &c.*

1. The plaintiff bank was located in Vermont; one of the defendants was and still is a resident of Vermont, and the other of Louisiana. The plaintiff obtained a judgment by default in a court in New Hampshire, having attached the defendant's real estate situated there; but no personal service of process was made, no notice was given except a constructive one by publication according to the laws of New Hampshire, and no appearance by the defendants; in an action brought upon the same cause of action as the former one, *Held*, that the original cause of action was not merged in the New Hampshire judgment; and that this action could be sustained.
2. *McGillivray v. Avery*, 30 Vt. 538, distinguished.

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ASSUMPSIT. Heard on demurrer to a replication to a plea in bar, December Term, 1882, Ross, J., presiding. Replication adjudged sufficient. The questions raised by the pleadings are stated in the opinion.

Belden & Ide, for the defendants.

The plea in bar sets forth a good defence. The action is assumpsit; and the plea avers in substance that the entire cause of action has been merged in a judgment rendered in New Hampshire by a court of competent jurisdiction upon the same promises set forth in this declaration. The New Hampshire judgment is a merger of the cause of action, and a bar to a further prosecution of the suit. *McGilvray v. Avery*, 30 Vt. 538; *Lapham v. Briggs*, 27 Vt. 31; *Rubber Co. v. Hoit*, 14 Vt. 94; *Hayward v. Clark*, 50 Vt. 615; *Green v. Starr*, 52 Vt. 428. By the replication the plaintiff offers to show, not by the record but by parol, that the former judgment was *in rem* only; that the defendants were not served with process except constructively by publication; that they did not appear in the suit; and that jurisdiction was acquired by the New Hampshire court only by the attachment of property and the publication. It will be observed that it is not the defendants who are trying here to defend against the former judgment. They assent to it, affirm its validity as a judgment, and offer to treat it as in all respects a valid and conclusive judgment against them. *Rogers v. Odell*, 39 N. H. 452; *Bank v. Wheeler*, 28 Conn. 483; *Child v. Powder Works*, 45 N. H. 537; *Andrews v. Varrell*, 46 N. H. 17; *Henderson v. Staniford*, 105 Mass. 504; *Gleason v. Dodd*, 4 Met. 339; *Bank v. Hooper*, 5 Gray, 574; *Reid v. Holmes*, 127 Mass. 827. Judgments like this have uniformly been held valid unless assailed by the defendant. *Buck v. Abbott*, 6 Vt. 590; *Stevens v. Fisher*, 30 Vt. 200; *Hendrick v. Whittemore*, 105 Mass. 23.

Poland, for the plaintiff.

Under these circumstances the law is perfectly settled that the judgment of the New Hampshire court has no force, except upon the property within its jurisdiction. The defendants not being

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within the jurisdiction, having no personal notice of the suit, and not having submitted to the jurisdiction by appearing, the judgment has no force as a judgment *in personam*. *Price v. Hickok*, 39 Vt. 292. The case of *Lapham v. Briggs*, 27 Vt., was decided upon the language of the pleas, "that the defendants had legal notice" and "that this appeared of record." The decision in no way conflicts with the case of *Price v. Hickok*. See 3 Gray, 508; 13 Ib. 591; 37 N. H. 470; 29 Me. 19. Where the court has no jurisdiction a judgment, without notice or appearance, as a judgment *in personam*, is an absolute nullity. 7 N. H. 257; 11 N. H. 299.

The opinion of the court was delivered by

VEAZEY, J. The demurrer to the replication raises the question whether the plaintiff, a national bank located in Vermont, having recovered judgment by default against the defendants, one then and still a resident of Vermont and the other of Louisiana, in a court of New Hampshire, upon the same cause of action upon which the present suit was brought, can maintain this action here, no personal service of the process in the New Hampshire case having been made on the defendants and they not having appeared in the suit, but that suit having been commenced by attachment of real estate of the defendants situated in New Hampshire, and constructive notice given by publication according to the laws of New Hampshire. There is high authority for holding that if the defendants had been residents of New Hampshire, but temporarily absent from the state, which occasioned the lack of personal service, they would have been upon principles of international law subject to the laws and the jurisdiction of the courts of that state; therefore the plaintiff would also be bound by the New Hampshire judgment. *Henderson v. Staniford*, 105 Mass. 504. In Freeman on Judgments, s. 570, (3 Ed.,) the rule is thus stated: "The position, however, which seems to be best sustained, both by reason and by precedents, is that each state has the authority to provide the means by which its *own citizens* may be brought before its courts; that the courts of other states have no authority to disregard the means thus provided; and finally that every judgment

or decree obtained in a state against some of its citizens by virtue of a lawful though constructive service of process should be as obligatory upon such citizen in every other state as it is in the state where it is taken." In this State the law is settled that the New Hampshire judgment, upon the objection of the defendants, would be inoperative as a judgment *in personam*. *Price v. Hickok*, 39 Vt. 292.

But it is claimed in behalf of the defendants that as they do not here object to the New Hampshire judgment, the plaintiff is bound by it; that it was voidable only, not void. The soundness of this claim depends upon the scope and effect of the New Hampshire proceedings. The service in that action was sufficient so far as the action was in the nature of a proceeding *in rem*. That is, the judgment was effectual to enable the court to reach the property attached and have it applied in satisfaction so far as it went. The amount not being sufficient to satisfy the whole judgment gave occasion for further remedy by this action in Vermont. If the publication of notice had not been preceded by an attachment, the New Hampshire judgment would have been void as a judgment *in personam*, though the statutes of New Hampshire had provided for notice in this way. This was held in the case of *Pennoyer v. Neff*, 95 U. S. 714, a leading case where the whole subject of the effect of constructive notice is ably discussed. If the New Hampshire judgment was absolutely void as a personal judgment, then the plaintiff properly disregarded it in bringing this additional action. Treating the case of *Pennoyer v. Neff*, *supra*, as controlling where the notice is by publication without attachment of property, then the only question left is whether the attachment added anything to the personal character of the judgment. This question seems to be well answered by Mr. Justice MILLER in *Cooper v. Reynolds*, 10 Wallace, 308, where, in discussing the character and effect of the proceeding where there had been an attachment of property of an absent defendant and publication of notice, followed by a judgment by default, he says: "If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be

established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well considered propositions: first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not effecting the attached property; nor could the costs in that proceeding be collected of the defendant out of any other property than that attached in the suit. Second, the court in such a suit cannot proceed unless the officer finds some property of the defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."

In the case of *Pennoyer v. Neff*, Mr. Justice FIELD says this doctrine received the approval of all the judges, and after citing and discussing many cases, he adds: "In all the cases brought in the state and federal courts where attempts have been made under the act of Congress to give effect in one state to personal judgment rendered in another state against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held without an exception, so far as we are aware, that such judgments were without any binding force except as to property, or interests in property, within the state, to reach and effect which was the object of the action in which the judgment was rendered, and which property was brought under the control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained and the party did not voluntarily appear,

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as effectual and binding merely as a proceeding *in rem*, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that the tribunals of one state have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits."

This case has been followed by others in the federal courts to the same effect. See *Brooklyn v. Insurance Co.*, 99 U. S. 370; *Empire v. Darlington*, 101 U. S. 92; *St. Clair v. Cox*, 106 U. S. 350. To the same purport was the holding in *Bissell v. Briggs*, 9 Mass. *469. PARSONS, Ch. J., says: "If however these goods, effects and credits are insufficient to satisfy the judgment, and the creditors should sue an action on that judgment in this state to obtain satisfaction, he must fail; because the defendant was not personally amenable to the jurisdiction of the court rendering the judgment." Similar citations could be made from our own reports and from those of other states, but the federal cases are recent and cover the ground. We do not overlook that the precise question involved in the above cases was mainly as to the rights of the defendants as effected by such judgments; but the discussion also involved the general character and effect of the proceedings. The case of *McGillray v. Avery*, 30 Vt. 528, most relied on by defendants, was distinguished from this by the fact that the New Hampshire court there had jurisdiction over the defendant as well as the subject matter of the action. The point here is whether the New Hampshire judgment, as a *personal* judgment, was void or only voidable. The ground upon which it would be pronounced voidable would be that the court never obtained jurisdiction over the persons of the defendants; but this would make the judgment void. The judgment was rendered by reason of jurisdiction over property of the defendants. In its operation and effect upon that it was neither void nor voidable. Beyond that it was either valid or invalid, independent of the choice of either party. It was not erroneous. There was no error in it. The proceeding was regular. The court had the

National Bank v. Peabody & Co.

right to proceed as it did proceed; and to the extent that the judgment was satisfied by the property attached, the proceeding would bar a recovery in this action. To that extent the judgment there is available here in behalf of the defendants the same as a payment would be. That is, that judgment is conclusive between the parties as to the property of the defendants there attached and appropriated to its satisfaction, but beyond that and as a judgment *in personam* we think it is a nullity. That court, having no jurisdiction of the defendants, had no power to adjudge as against them upon the amount of the plaintiff's claim, no power to pass upon the defendants' personal rights and obligations; therefore, a judgment in form against them, as an incident of the proceeding against the property attached, could not operate as a merger of the original claim. We think the proceedings had no further force or effect than to enable the New Hampshire court to apply the property there attached, or its proceeds, on the plaintiff's claim as established in that proceeding; that beyond this it created no right either against the defendants or in behalf of the plaintiff. It therefore furnished no basis upon which to bring a suit. We do not think the effect of the attachment was to aid the constructive service of the process so as to make it equivalent to personal service, except to the extent that the court was reaching after property within its jurisdiction. "Jurisdiction of the property does not draw after it jurisdiction of the person."

The case of *Rangely v. Webster*, 11 N. H. 299, was similar to this in the facts and question involved, and the same conclusion was reached. In a well stated-opinion the court say: "To maintain the position that in the case of an action upon the judgment, the judgment is void, and may be so treated, but that when the action is upon the original demand the same judgment is valid, is to maintain that the form and manner of the action adopted determine the character of the former judgment, its validity, or invalidity, instead of the facts and circumstances attending its recovery." *Whittier v. Wendall*, 7 N. H. 257; *Downer v. Shaw*, 22 Ib. 282; *Wright v. Boynton*, 37 Ib. 9; *Bank v. Bulman*, 29 Me. 19; *Kane v. Cook*, 8 Cal. 449; *Bigelow Estoppel*, 240, 251.

TAFT, J., dissents.

Judgment affirmed.

 Cheney v. Ryegate.

J. Y. CHENEY AND WIFE v. TOWN OF RYEGATE.*

Highway. Evidence.

1. In an action for injuries received while travelling on the highway, caused by a collision with a runaway team whose driver had been thrown from the sled in consequence of a bad place in the road about fifty rods back of the place where the accident occurred, evidence that such team had the habit of running away is not admissible.
2. Memoranda of measurements made at the time, confirmatory of the evidence given by the witnesses who made and produced them, are admissible.
3. The trial being in June, 1882, the accident having occurred in November, 1880, one witness testified that he "met a team there three or four years ago," that the "road was the same as at the time of the accident," that he "was going north and started a little down the hill and met a team and could not pass, and I backed back a little, and they passed"; another witness: "I think it was in 1877, width of road was the same, . . . I met a team. . . . They backed back; I met the team at the top of the hill. I don't think teams could pass on that hill." *Held*, admissible.

ACTION for injuries received by the plaintiff wife while travelling on the highway. Jury trial, June Term, 1882, Caledonia County, Ross, J., presiding. Verdict for the plaintiff.

The injury was occasioned by a runaway pair of horses attached to a sled, running into the team from behind in which the plaintiff wife was riding; and the plaintiff declared for and relied upon an insufficiency in the road at the point where the collision occurred, and also a point in the road about fifty rods back from the point of collision. The defects complained of at the point of collision were narrowness in the road and a steep bank rising up on both sides of the road. The defects complained of at the point about fifty rods back were narrowness and a steep bank descending from the lower side of the road. The plaintiff claimed, and introduced evidence tending to show, that the narrowness of the road at the point of collision caused the accident by being insuffi-

* Heard at October Term, 1882.

cient in width to allow the runaway team to pass ; that the driver was thrown from the sled of the runaway team at the point in the road about fifty rods back, by reason of the insufficiency of the road at that point and that the runaway was caused by said last-named insufficiency, or that the horses might have been gotten under control by the driver had he not been thrown from the sled by the insufficiency of the highway.

It appeared that the driver of the runaway horses was an old man named Buck, about eighty years of age, who deceased before the trial, and that he was not on the sled at the time of the collision ; and the plaintiff's evidence tended to show that there were marks in the snow on the lower side of the road at said last-named point indicating that a sled had passed out from the travelled part along there and that one runner had gone over this bank, and there were marks in the snow like what would be made by a man's feet striking in the snow and sliding along. The defendant's evidence tended to show that there were no marks of a man's feet in the snow at that point. It appeared that there were marks in the snow indicating that said two horses were running fifty or sixty rods back from this point and were some of the way in the road and some of the way out on the margins.

The defendant, for the purpose in connection with the evidence of the said marks indicating running horses before the horses arrived at said point where plaintiff claimed Buck was thrown off, offered to show that one of said Buck's horses was a runaway horse, for the purpose of showing that said Buck entirely lost control of said horses when they first commenced to run and before they arrived at the place where the plaintiffs claimed an insufficiency in the road and at a place in the road where no insufficiency was claimed, and that the runaway was the fault of said horse and not of defendant's highway. The court excluded this evidence, to which the defendant excepted.

The plaintiff, in his opening testimony, produced several witnesses who testified, without referring to any memoranda, to the width of the road in several places, including the place where the plaintiff's evidence tended to show the deceased wife was struck. These measurements were contradicted by the defendant ; and the

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plaintiff recalled his witnesses in rebuttal and they were allowed to testify, against the defendant's objection, that they made memoranda of their measurements at the time the measurements were made, and to produce the same and testify to the correctness of said memoranda, and the memoranda were then put into the case. These memoranda were made on little pieces of paper, and in one or more instances the memoranda contained statements like this; "Distance from where struck to pine tree, five feet." The place where the plaintiff's wife was struck was controverted by the defendant, and the witnesses making such memoranda had no knowledge of where she was struck, except hearsay. The witnesses recalled to produce said memoranda did not, when recalled, attempt to testify as to the width of said road and the distances between other points, except by identifying the memoranda and swearing to their correctness. No special objection was made to the memoranda because they contained the words above quoted. The objections and exceptions were to their admissibility generally.

The memoranda were referred to and admitted only as confirmatory of the evidence given by the witnesses who made and produced them. The injury occurred on the 26th day of November, 1880, on a northerly descent in the road, which was spoken of on the trial as "a hill." It appeared that bushes had been growing for some years on the margins of the road, and that they grew close to the travelled portion of the road, but these bushes had been mainly cut in the fall of 1880, and before the accident.

Wallace, a witness on behalf of the plaintiff, was allowed to testify, against the defendant's objection, that he met a team there three or four years ago—and he was unable to tell exactly when—testified the road was the same as at the time of the accident, that he "was going north and started a little down the hill and met a team and could not pass, and I backed a little and they passed." King, a witness called on behalf of the plaintiff, testified, against the defendant's objection, as follows: "I think it was in 1877, width of road was the same. I met a team. I was coming south; it was just dark. I heard some one halloo. They backed back; I met the team at the top of the hill.

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I don't think teams could pass on that hill." To the admission of this evidence the defendant excepted.

The plaintiff, in his opening testimony, had been confined to the condition of the road at the time of the accident, and the defendant was governed by the same rule in the testimony adduced in defence, and this testimony of experiments in passing was put in by the plaintiff in rebuttal.

Belden & Ide, for the plaintiffs.

Alexander Dunnett, for the defendant.

The opinion of the court was delivered by

REDFIELD, J. I. The plaintiffs' case tended to show that his carriage was run into and the wife injured in a narrow ravine, or cut, in the highway by a runaway team coming from the rear; and that the driver of the latter team was thrown from his sled in consequence of a bad place in the road, about fifty rods back of the place of collision, and the horses left running at large without a driver, when if the driver had kept the control of the reins, he would have avoided the collision and injury; and therefore the defect in the road at both points contributed to the injury. The defendant offered to prove, in reply, that the horses in the runaway team had the vicious habit of running away, and this testimony was excluded. We think there was no error in this. The towns are required to so construct their highways as to guard against accidents likely to occur. In *Kelsey v. Glover*, 15 Vt. 708, Kelsey's horse was killed by a runaway team, forced into the highway and against Kelsey's horse by a tree-top on the margin of the road. That horse had the historic vice of running away, "without any occasion." Whether the runaway horses are instigated by inherent vice, or adequate occasion, is not material; it is enough that the danger of injury to the plaintiffs was enhanced by this accident, or incident, that occurred in consequence of this bad place in the road. Whether the owner or driver of that team could have recovered damages for his injury, of this defendant, is not involved in this case.

Wilder v. Gilman.

II. The memoranda of measurements, made at the time, in connection with the testimony of witnesses who made them or knew of their accuracy, are always admissible; and if the court deemed it important or proper to allow plaintiffs' witnesses recalled, and the memoranda produced to rebut the accuracy of the defendant's measurements, it was all within the *discretion* of the court. It was merely confirmatory of plaintiffs' evidence already in the case. *Lapham v. Kelley*, 35 Vt. 195; *Cross v. Bartholomew*, 4 Vt. 207.

We think the testimony of Wallace and King was, under the circumstances, admissible. We find no error, and the judgment is affirmed.

ARTHUR WILDER v. C. Q. GILMAN.

*Appeal by Defendant. Offset of more than Twenty Dollars.
Good Faith. Petition.*

1. Under the fraud, accident and mistake statute, a defendant who pleads in offset demands exceeding \$20, and the County Court on petition find that he pleaded in *good faith*, is entitled to an appeal, although the justice adjudge that he did not plead in *good faith*.
2. R. L. s. 1061, appeal from judgment of a justice of the peace; R. L. s. 1428, fraud, accident and mistake statute, construed.

PETITION. Heard by the court, June Term, 1882, Ross, J., presiding. Dismissed.

M. Montgomery, for the petitioner.

Belden & Ide, for the defendant.

Wilder v. Gilman.

The opinion of the court was delivered by

REDFIELD, J. The petitioner presented an offset before the magistrate for more than \$20, and swore to his offset, placing his damages at \$200. The County Court found as facts that the petitioner presented to the justice, on trial of the case, said offset, in good faith, and swore to it, and there was no evidence against it; but the justice adjudged that he did not plead said offset in *good faith*, and from the manner the petitioner conducted in regard to said offset, that the justice, *without acting corruptly*, could adjudge that he did not plead the same in *good faith*, and for that reason denied the petition and *refused* an appeal.

From the facts stated, the petitioner made a *case* before the justice that entitled him, as a matter of legal right, to an appeal. This legal right was denied him by the justice, which the County Court say could have been done without acting *corruptly*. The court do not find that he *did* do this legal wrong with corruption.

I. The statute of jeofail has been in force for centuries, and beneficent in its operation. It is incident to all human tribunals that judicial power should have place somewhere in the progress of trial of cases, to amend, correct, and restrain, to prevent the miscarriage of justice. And more especially in regard to inferior and petty tribunals whose knowledge of legal rights are, presumably, limited; and as the surroundings, and appliances, about such courts are more calculated to subvert and pervert the cause of justice than to establish it, it is the more necessary that this correcting power should exist, and be exercised. The statute uses general, and quite comprehensive, terms in describing the purpose and scope of such petitions, and was intended to remedy all cases where the petitioner sought an appeal at the proper time and was legally entitled to it, and it was denied to him without his fault. *Good faith*, or the want of it, is not a visible, tangible fact, that can be seen and touched, but rather a *state* or condition of mind which can only be judged of by actual or fancied tokens and signs; and the greatest errors have been committed, and the bloodiest and blackest pages in history written by men who arrogate to themselves *good faith*, and deny it to others.

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The richest ingredient of our inheritance is that there is woven into the texture of our organic law that crime cannot be predicated upon the fancied state of mind; nor fundamental rights lost or denied, except for *overt acts*. Sin, whether original or imputed, doubtless exists, and sometimes in the most subtle form, but it has been found wiser and safer to leave that to *free discussion* and the harmless exercise of opinion; that the "subtle disputants on creeds" may have "free course," without power to inflict penalties for error of opinion or a bad state of mind. It is not probable that this justice had a very accurate conception of what "good faith" meant, whether it had reference to the "Nicene Creed" or to some *abstruse process* of the law which he did not fully comprehend. This statute to work *beneficial* results must have a *practical* administration. The petitioner was denied a valuable right, because, as the record is made to say, he did not present his claim in *good faith*, though he swore to the claim and there was no evidence to the contrary. It was somewhere in the woods of this same County, when the pettifogger had free course, and petty justices rendered final judgments in actions for *slander* and other matters without jurisdiction, that an honest suitor sued in trespass for taking personal property, read a case to the very point in the Vermont Reports, wherein the case was stated as *trespass de bonis asportatis*, showing what he had done was lawful and right. The pettifogger, with a show of offended dignity at such outrages upon justice, informed the magistrate that the defendant did not read that case to the court "in good faith. He *knew better*; it had nothing to do with the case in hand; it showed on the face of the opinion of the court that it was a miserable quarrel between two men about a lot of *potatoes*." It hardly need be added that the defendant was cast in his suit for the want of "good faith." And we remember as one of the well authenticated incidents of the Orleans County bar that the late Samuel Sumner, having graduated with honor from college and regularly admitted to the bar, began practice at Coventry. He was soon called to defend a suit at Derby. Sumner felt scandalized and exhibited some passion at the unprofessional treatment he received, whereupon objection was made to Sumner that his pretence of be-

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ing an *attorney* was not "in good faith; that he does not look nor appear like an attorney;" and neither a defence nor appeal was allowed to Sumner's client. Whether such a miscarriage of justice may be technically and strictly termed fraud, accident, or mistake, or not, it is a *mishap*, when final judgment has come upon a man, and legal rights denied him, without fault on his part. It is more common that justices are so acted upon that they get in the wrong, than that they, of their own volition, act corruptly. And from what is stated in this, it would seem more probable that the mind of the justice, especially all judicial qualities of his mind, by the charges and counter-charges of good and bad faith, was in a state of *catalepsy*, so that he denied the appeal without much considering on what legal ground it could be put. It was a *mishap*, and for all practical purposes may be called "accident or mistake."

The judgment is reversed, and cause remanded to the County Court to allow the petition on such terms as said court shall prescribe.

J. B. HUBBARD v. SUSAN A. BUGBEE.

Note of Married Woman. Consideration of Written Promise to pay Made After Death of Husband. Moral Obligation.

The defendant being a married woman executed her promissory note for borrowed money for the *improvement of her separate real estate*. After the death of her husband, she, being *sole*, promised in writing to pay the amount of the note. In an action brought upon the promise; *held*, that the consideration was ample, and the promise legally binding upon her.

ASSUMPSIT. Heard on demurrer, December Term, 1882, Ross, J., presiding. Judgment *pro forma* for the defendant. The dec.

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laration averred that the defendant, being a married woman, executed her promissory note; and that after the death of her husband she, being *sole*, promised in writing to pay the note.

Cahoon & Hoffman, for the plaintiff.

The law is well settled that the debts of a married woman contracted in the management of her separate estate, and for its benefit, on the credit of such estate, in equity will be enforced against such estate. *Sargeant v. French*, 54 Vt. 891; *Dale v. Robinson*, 51 Vt. 20; *Priest v. Cone*, Ib. 495; 46 Ala. 170; 60 Barb. 406; 3 U. S. Dig. N. S. 385; 48 Miss. 486; 37 Md. 510; 47 Cal. 32; *Kelley v. Long*, 4 Hun. 714. The intention of a married woman to charge her separate estate is to be inferred from the fact that she gave her note. *Phillips v. Graves*, 20 Ohio St. 371; 35 Ohio St. 297; *Williamson v. Duffey*, 19 Hun. 312; *Schafroth v. Ames*, 46 Mo. 114; 4 U. S. Dig. 35; 70 N. Y. 295; 45 Ala. 370. In general a married woman is liable, so far as she has separate estate, for her debts;—in some States at law, and in others at equity. *Batchelder v. Sargeant*, 47 N. H. 262; 110 Mass. 51; 11 U. S. Dig. N. S. 434. If her estate was liable in equity, the consideration for the promise was sufficient. *Booth v. Fitzpatrick*, 36 Vt. 608; *Blodgett v. Skinner*, 15 Vt. 716; Chit. Con. 52, n.; *Vance v. Wells*, 8 Ala. 399; *Geer v. Archer*, 2 Barb. 420; *Cook v. Bradley*, 7 Conn. 57.

Harry Blodgett and M. Montgomery, for the defendant.

The defendant being a married woman at the time she gave the note, her promise to pay is absolutely void. *Brown v. Sumner*, 31 Vt. 671; *Dale v. Robinson*, 51 Vt. 20; Ib. 495. The promise of the defendant in writing after the decease of her husband was without sufficient consideration. *Haywood v. Baker*, 52 Vt. 430; 1 Parsons Con. 432, n.; *Jenning v. Brown*, 9 M. & W. 501; *Eastwood v. Kenyon*, 11 A. & E. 438.

The opinion of the court was delivered by

REDFIELD, J. This is a demurrer to the declaration. It alleges in substance that the defendant, then a married woman, and the

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owner in her own right of a farm in Concord, borrowed money of Lucy M. Hubbard, and used the money in the improvement of her said farm; and after the death of her husband, and when *femme sole*, she promised in writing, in consideration of said loan and her moral obligation to pay said debt, to pay said note to the plaintiff, who is the *bona fide* holder and bearer of said note for value.

Was there such *moral obligation* that the promise was legally binding upon the defendant? Our attention has been called to *Haywood v. Baker*, 52 Vt. 480. We have no occasion to question the soundness of the opinion of Judge BARRETT in that case, although the reasoning is wholly technical. The rights and duties of married women have within the last few years not only been much modified, but in some jurisdictions been wholly changed. Ch. J. SHAW, speaking of the legal condition of a *femme covert*, under the common law, said "a man and his wife are *one*, and that *one* is the husband." But it is now known and recognized that a man and his wife are *two*, and often the important personage of the two is the *wife*. And it is not a *fortunate*, nor, as we think, a strictly *correct*, use of language to say that contracts of married women are *void*. It has always been recognized in this State and elsewhere, that money contracts of a *femme covert* are binding on the conscience; and a court of equity will compel her to respond and pay what in conscience she ought to have paid. She is, it is true, under the *disability of coverture*, and at law there are insurmountable difficulties in reaching her or her separate property by the process of court. But her contracts as to using and improving her separate estate are in no sense *void*, but binding contracts upon the person and property of a married woman. She could not, to be sure, be imprisoned. The law forbids that; but her conscience could be charged and her separate estate. And as the *rights* of married women become enlarged, their reciprocal and correlative duties do, and should, keep pace with them, so that the administration of the law shall be consistent with itself. This woman owning a farm as her separate estate hired this money to improve and render beneficial to her her estate. She gave her note for the money and used it improving

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and enhancing the value of her property. After her husband died she continued to receive and enjoy this improved use and enhanced value of her estate, arising from this loan of money, recognized the binding obligation of her note given for it, and promised in writing to pay it. It cannot be said, without discarding the the whole reason, web and structure of the law, that no moral *duty* rested upon her to pay this loan of money which had become incorporated into her separate estate. On the other hand as she had the *right* to enjoy the beneficial use of the money in her separate estate, so there rested upon her the correlative *duty* of paying for it; and this *duty* could have been enforced against her property. When she promised in writing to pay what she was bound in conscience to pay, she was under no disability of coverture; and we think the consideration was ample to require her to "do as she agreed." If this were not so, then the law in reference to married women is rather "a delusion and a snare," than a beneficent provision to relieve married women from the unreasonable disability which barbarism had entailed upon them. The demurrer is overruled, and on motion of the defendant the cause is reversed *pro forma*, and remanded that defendant may replead on the usual terms.

STATE v. ALICE DAY.

Criminal Law. Confession. Sheriff's Evidence. Practice.

1. The sheriff and state's attorney talked with the respondent while in jail. The sheriff first testified that no inducements to confess were held out, but afterwards said "that he presumed he and the state's attorney both told the respondent it would be better for her to tell the whole story, and the punishment would be likely to be lighter." *Held*, that his testimony was not admissible.
2. When there is no conflicting testimony as to what the inducement was, the decision of the court below may be revised by the Supreme Court.

INFORMATION filed by the state's attorney for stealing. Trial by jury, December Term, 1882, Ross, J., presiding. Verdict, guilty. Questions of evidence and practice stated in the opinion.

Harry Blodgett and *Henry C. Ide*, for the State.

Elisha May and *M. Montgomery*, for the respondent.

The opinion of the court was delivered by

VEAZEY, J. This is an information for stealing a horse, wagon, harness and buffalo robe. Numerous exceptions were taken on the trial, but the only one which we are all agreed must be sustained is that to the admission of the evidence tending to show a confession by the respondent. It appears that while she was under arrest and in jail in Sherbrooke in Canada, she was visited by the sheriff and state's attorney who there had conversation with her. The sheriff was improved as a witness by the State, and testified first that on one occasion when he visited the respondent with the state's attorney, no inducements to confess were held out to her by either of them, but afterwards said "that he presumed he and the state's attorney both told respondent it would be better for her to tell the whole story, and the punishment would be likely to be lighter." This was not contradicted. Objection

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was, therefore, made to the witness' testifying to what she said ; but the objection was overruled, and the witness was allowed to testify to the conversation which tended to show admissions of guilt, to all which the respondent excepted. She was quite young ; in jail, away from friends, and without counsel to advise her. We think the admission of this evidence was a violation of the settled rule in this State, " that a confession must never be received in evidence when the respondent has been influenced by any threat or promise." The discussion of the question by the late Chief Justice PIERPOINT, in *State v. Walker*, 34 Vt. 300, is so applicable to this case it is sufficient to refer to that opinion.

Another question is made, that the judgment of the County Court that the confession was voluntary and the evidence should be admitted, is conclusive and cannot be revised by this court.

The same question was raised in *State v. Walker, supra* ; and we think the true view was there expressed, to the effect, that when the testimony as to the promise, threat or inducement, is conflicting, and the court must pass upon the character and weight of the testimony upon each side, in order to determine whether the confession is voluntary or not, the decision thereon is final. But in a case like this where there is no conflict in the testimony or dispute about the facts, the decision of the County Court admitting the testimony may be revised in this court. *State v. Phelps*, 11 Vt. 116.

The judgment of the County Court reversed, new trial granted, and the case remanded.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTY OF BENNINGTON,
AT THE
FEBRUARY TERM, 1883.

PRESENT :

| | | |
|--|---|-------------------|
| HON. TIMOTHY P. REDFIELD, HON. JONATHAN ROSS, HON. H. HENRY POWERS, HON. RUSSELL S. TAFT, | } | ASSISTANT JUDGES. |
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A. G. POTTER v. JOHN T. DOOLEY.*

[IN CHANCERY.]

*Deed. Mistake in Recording. Filing Deed. Constructive Notice.
Tax Title.*

In May, 1869, D. executed a mortgage on certain lands to secure his notes ; in November of the same year, the notes and mortgage were assigned to K. as security ; in November, 1872, D. executed a deed to the defendant, in which were these words, "*and an undivided half of the tract I purchased of*"—(D's mortgagees). In the record of the deed the words above quoted were omitted until a second record was made in 1879, while this suit was on trial, in which these words were included. In 1876 K. re-assigned, after they were due, the notes and mortgage to his assignors, the original mortgagees, who on the same day assigned

* Heard February Term, 1881.

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them to the orator. At the time the notes and mortgage were given, they were left with a third party and were not to be delivered until the land was cleared of incumbrances, and measured, and if it fell short the notes were to be reduced to an amount agreed on,—\$4.00 per acre. After the assignment to the orator, through some misunderstanding, he obtained possession of the notes and mortgage, foreclosed, and the decree became absolute against D. The orator was without actual notice of the deed to the defendant. In a foreclosure proceeding, *Held*,

1. That the orator is entitled to a decree against the defendant ; that there was no constructive notice; that the filing of a deed is only the *inchoate record*; and that when a deed has been recorded : nd taken from the town clerk's office, it is no part of the files, and the record is decisive of equities.
2. That the decree concludes all equities of D. and of all claiming under him.
3. That the defendant cannot stand on a tax title when the grand list of the town was not offered in evidence.
4. It is doubtful whether any one but D. could insist on the conditions of the contract as to measuring the land, &c. ; but his rights, and the rights of his grantees, are concluded by the decree.

PETITION to foreclose a mortgage in common form. Heard on the report of a special master, December Term, 1880, VEAZEY, Chancellor. Decree for the orator. It appeared that on the 10th day of May, 1869, Hazael Wiley, C. C. Wiley and George O. Wiley executed and delivered to one Peter Dooley a warranty deed of certain mountain lands, situated in Stamford, Vt., and partly in Mass. ; that on the same day the said Peter Dooley executed and delivered to the grantors in the first named conveyance a mortgage deed of said premises, to secure the payment of six promissory notes described therein ; that, also, at the same time the said Wileys gave to said Dooley the following writing :

“ It is understood and agreed by the undersigned that the notes given by Peter Dooley to Hazael Wiley and bearing even date with this instrument, shall remain in the hands of B. F. Robinson, Esq., for safe keeping, and are not to be used for the benefit of said Wileys until the land is measured out and quantity of acres ascertained ; and if said land falls short of the required number of acres to amount to the sum set forth in said notes at four dollars per acre, the said notes are to be reduced in that proportion, and increased if it shall overrun in like proportion ; and also pay up all incumbrances, and make good any defect in said title to said Dooley, his heirs or assigns.”

It also appeared that on the 27th day of November, 1869, Hazael Wiley assigned the said notes and mortgage to one Ketchum as collateral security for what he owed him ; that C. C. and George O. Wiley ratified the assignment ; and that, in 1872 and in 1875, the said Ketchum and Dooley entered into contracts

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in writing by which the former agreed to take lumber on the said land in payment for the notes. The orator claimed the contract of May 10th, 1869, had been performed by the Wileys; the defendant, that it had not; and the orator also claimed that Ketchum had no authority to make the two last contracts as he only held the notes for security. But under the decision of the court what was done under these contracts is not material. After the notes were due in 1876 Ketchum reassigned the notes and mortgage, and at the same time they were assigned to the orator. The master found:

“The orator then went to B. F. Robinson, in whose keeping the four notes still remained, and told said Robinson said mortgage had been assigned him; and that he was informed the conditions upon which the notes were deposited had been fulfilled, and that he was entitled to receive them. Some conversation was had in relation to the terms on which the notes were left, the details of which did not fully appear; after which Robinson delivered said notes to the orator. Robinson testifies that the orator wanted to copy the notes, and that he let him take them for that purpose. The orator testifies that he told Robinson he would make copies of the notes and give him, and that he did so. I find that the orator asked for, and received, said notes without making any misrepresentations as to what had been done or told him in relation thereto, and without making any stipulation limiting his possession, control or use of them; but that Mr. Robinson misunderstood the matter, and supposed that after copying, the notes themselves would be returned. Peter Dooley knew nothing of the transaction, and did not assent to the delivery of said notes.

An action was brought by the orator against Peter Dooley to foreclose said mortgage in Massachusetts, and was entered at a term of court held in June, 1876; and in October of the same year a decree thereon was obtained, the defendant appearing but not making answer thereto. The orator also brought his petition against Peter Dooley and another to foreclose said mortgage in Vermont; and the same was entered at the December Term of the Bennington county Court of Chancery in 1876; the defendant Dooley appeared and filed an affidavit of defence; the case was thereupon continued, but no answer was filed, and decree upon said petition was obtained at the June Term following. On the 25th day of November, 1872, Peter Dooley executed and delivered to his son, John T. Dooley, the defendant, a deed of certain lands in Stamford; said deed was received for record at the town

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clerk's office in Stamford on the same day ; and I find that it then contained the words ' and an undivided half of the tract I purchased of Hazael Wiley,' as they now appear in said deed. Said deed was thereupon recorded in the land records of said town, the words above quoted not appearing. It did not appear that the orator or his assignors had any knowledge of said deed other than such as was derived from the record, until after the foreclosure proceedings above set forth. Said deed was again recorded in the town clerk's office in Stamford on the 11th of December, 1879, after its introduction in evidence before the master, but previous to the conclusion of the hearing, the record then made corresponding with the original. On the 15th day of April, 1876, the constable of Stamford sold for taxes to one A. W. Wilmarth, of Stamford, the interest of Peter and John Dooley in certain lands in said town, under a warrant and upon certain proceedings. No grand list of the town of Stamford, or documentary evidence bearing upon said sale, was shown in evidence, other than the papers contained in said last named exhibit. On the 26th day of April, 1877, said officer executed and delivered to said Wilmarth a conveyance of the lands thus sold ; on the 17th day of December, 1877, said Wilmarth quit-claimed to John T. Dooley, the defendant, all the right and title acquired by virtue of said constable's deed."

H. W. Brigham and *C. J. Parkhurst*, for the defendant.

The deed was properly lodged in the clerk's office for record, and although not fully transcribed upon the records, was legally recorded on that day, as no enrollment was necessary to invest the title. *Ferris v. Smith*, 24 Vt. 27.

The defendant's said deed is an absolute conveyance, and the omissions therein are clearly clerical errors and it is apparent from the face of the instrument what the corrections should be ; hence it is the duty of the court to correct them by construction. *Richmond v. Woodard*, 32 Vt. 833 ; *Wood v. Cochran*, 39 Vt. 544 ; *Goodrich v. Perkins*, 39 Vt. 598.

A. Potter, for the orator.

The defendant cannot question the orator's right to the notes ; because, first, he is no party to the agreement of May 10th, 1869 ; and second, no one but Dooley could raise the question ; and it

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has been judicially determined against him in the foreclosure suits. The tax sale was void. 48 Vt. 648; 47 Vt. 383; 18 Vt. 470; 13 Vt. 609; 21 Vt. 481.

The opinion of the court was delivered by

REDFIELD, J. John Dooley executed a mortgage on the 10th day of May, 1869, to Hazael Wiley, C. C. Wiley and George O. Wiley, of certain lands in Stamford in this State, and a portion of them was situate across the State line in Massachusetts. After the notes had become due and paid in part, the mortgage and notes were assigned and transferred to the orator. Before said assignment on the 25th of November, 1872, Peter Dooley conveyed by deed certain lands in Stamford to the defendant, and in said deed were written the words, "and an undivided half of the tract I purchased of Hazael Wiley." The deed was recorded in the town clerk's office of Stamford, and in the record the words above quoted were omitted.

After the assignment to the orator, and after the title had become absolute in the orator against John Dooley by foreclosure of this mortgage, and while this suit was on trial, said deed to the defendant was again recorded, and the omitted words included in the record. It is not claimed that the orator had actual notice that the defendant's deed covered any portion of the land included in the orator's mortgage.

I. The decree against John Dooley concludes *him* of all equity in the premises, and we think all equities of those who claim under John Dooley by an unrecorded deed, of which the orator had no notice.

It is claimed that defendant's deed was placed on *file* for *record* which was constructive notice to the orator. It is true while the deed *remained on file* it is notice for a reasonable time, until the deed may be spread on the records. But after the deed is recorded, though erroneously, and the deed and its filing taken from the office of the clerk, the *record* is the only thing *in the office* that can give notice to those who may be dealing with the title. And no scrutiny of the records and files in the town clerk's office would

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indicate that the defendant had any claim or title to the land included in the orator's mortgages. The orator, having extinguished the title of John Dooley by a judicial decree against him, stands with the same rights he would if that title had been extinguished by a deed from John Dooley. The filing of a deed for record is the *incipient* record, and operative from the date of filing; but after the full record is made the deed is no longer a part of the files but belongs to the party.

II. The sale of the land by the constable of Stamford to Wilmarth for taxes is invalid. No grand list of the town of Stamford was offered in evidence, or shown in the case. The grand list of the several towns is the basis of taxation, and an indispensable requisite to justify the sale of property for taxes; even if the listers are not under the sanction of an oath in making up the list and the valuation of property, the grand list is invalid, and the taxes assessed thereon are void. *Houghton v. Hall*, 47 Vt. 333; *Tunbridge v. Smith*, 48 Vt. 648. There are other obvious omissions of statute requirements in the sale of this land for taxes. The collector's deed, therefore, to Wilmarth conveyed no title.

III. The defendant contends that the orator is without right by reason of the contract of May 10th, 1869, between the original parties to the mortgage in regard to delivering the mortgage as an escrow, until the land was measured and the incumbrances cleared away. It might be doubtful whether any one but Peter Dooley could insist upon the conditions of said contract; and it has been judicially determined as to him, that the conditions of said contracts have been complied with; and as we have before said, all equities arising from an unrecorded deed or other contract with Peter Dooley, the mortgagor, are concluded by the decree against him.

The result is that the decree of the Court of Chancery is affirmed, and cause remanded.

Casey v. Casey

JOHN CASEY v. PATRICK J. CASEY.

Ejectment. Will. Remainder. Condition Precedent.

1. In an action of ejectment between two brothers,—the question being as to the ownership of a small piece of land, and this turned on the following clause in their father's will : " I give and devise to my beloved son John Casey the home farm, &c. . . . for and during his natural life with remainder over to his two sons— ; and at his decease I give the same to them and their heirs forever ; and this *legacy is given upon the express condition that the said John Casey pay to my son Michael Casey the sum of seven hundred dollars on or before the first day of April after my decease.*" The \$700 had not been paid. *Held*, that the intent of the testator should govern ; that the title to the real estate *vested* in the devisee on the death of the testator ; and that Michael had only an *equitable lien* on the real estate.
2. *Variance.* Under the statute, R. L. ss. 1247, 1250, allowing the writ of ejectment, there was no *variance*, although the declaration averred a seisin in fee in the plaintiff, when he had only a life estate.
3. R. L. s. 1247, ejectment ; s. 1250, recovery according to the right, construed.

EJECTMENT. Plea, general issue. Trial by court, December Term, 1882, VEAZEY, J., presiding. Judgment for the plaintiff. The plaintiff and defendant were brothers. The declaration alleged a seisin in fee in the plaintiff of a narrow piece of land, including a spring, and ouster by the defendant. The plaintiff claimed title by virtue of his father's will. The \$700 had not been paid. The clause in contention was as follows :

" I give and devise to my beloved son, John Casey, the home farm, which I purchased of Peltiah Armstrong, and the land adjoining the same on the north, which I purchased of John W. Vail, for and during his natural life, with remainder over to his two sons, Francis and Michael Casey ; and at his decease I give the same to them and their heirs forever. And this legacy is given upon the express condition that the said John Casey pay to my son Michael Casey the sum of seven hundred dollars on or before the first day of April after my decease."

The defendant objected to a copy of the will as evidence :

(1) Because it does not tend to show a title in fee to the premises, but only an estate for life in the plaintiff with remainder

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over in two of the plaintiff's children, who are not parties to this action. (2) Because it tends to show an estate in the plaintiff only upon condition that he should pay to Michael Casey, another son of the testator, the sum of seven hundred dollars on or before April 1st, 1876, and it was not shown that this condition had been complied with.

H. A. Harmon and Kittredge Haskins, for the defendant.

The plaintiff cannot maintain this action on the title shown. *Cheney v. Cheney*, 20 Vt. 606. A merely equitable estate in land will not support ejectment. *Mulford v. Tunis*, 35 N. J. L. 256; *Dewey v. Long*, 25 Vt. 564; 37 Vt. 653. The title did not vest in the plaintiff, as the \$700 had not been paid. It was a condition precedent. *Nevins v. Gourlay*, 95 Ill. 206; 2 Redf. Wills, 283, 284; Jarman Wills (4th. Am. Ed.), 683; *Finlay v. King's Lessee*, 3 Pet. 346; *Rollins v. Riley*, 44 N. H. 91. If the condition were a condition subsequent, and was not performed at the time mentioned, the heirs of the testator, of whom the defendant is one, might each for himself enter and take possession of his share. 2 Bl. Com. 154. See *Thompson v. Thompson*, 9 Ind. 329; *Ladd v. Harvey*, 21 N. H. 514. Where an estate in land was devised to one upon condition that he pay a certain sum of money to another person, by a certain day, and he did not pay it, one of the heirs of the testator entered and brought ejectment for her undivided share, and the judgment was for the plaintiff. *Wheeler v. Walker*, 2 Conn. 196; *Ashley v. Burrell*, 48 Vt. 491. The heir can retain possession until partition. *Avery v. Hall*, 50 Vt. 13. As to variance, see 4 Kent, 4; 2 Bl. Com. 105, 120; 46 Vt. 516; 12 Ill. 420; 58 Ill. 97.

Sibley & Son and Batchelder & Bates, for the plaintiff.

The plaintiff is tenant for life with right of entry, and as such may sustain ejectment. 1 Chit. Pl. 172; R. L. s. 1247. It is admitted that the legacy to Michael of \$700 was made a charge on the "home farm"; but on the death of the father the plaintiff took a *vested* interest in the property,—an equity of redemption. The condition in this will should receive the same construction as that in *Scott v. Patchin*, 54 Vt. 275. The fact that the \$700 was

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a lien on the property is no bar to this action. *Dunbar v. Dunbar*, 3 Vt. 472; *Wood v. Hildebrand*, 2 Am. Rep. 513. But at all events the plaintiff can maintain this action. He was in possession, claiming title. Defendant had no color of title. 1 Chit. Pl. 173; 8 East, 356; *Day v. Albrow*, 9 Wend. 223; 4 Vt. 295; 27 Vt. 640; 28 Vt. 332; 36 Vt. 261.

The opinion of the court was delivered by

TAFI, J. I. The right of the plaintiff to maintain this action depends upon whether he took under his father's will the legal estate in the premises sued for. His father devised the premises to the plaintiff for life, with remainder to the plaintiff's children, upon the express condition that the plaintiff paid to his brother Michael seven hundred dollars on or before the first day of April after the testator's death. That sum has never been paid; and the defendant insists that the legal title to the premises has never vested in the plaintiff. There are cases in our sister states which hold that such conditions are conditions precedent, and that no title to the lands devised vests until the conditions are performed. Such may be the rule in the construction of deeds and contracts; but great latitude has been exercised by the courts in the construction of wills. "It has been held that that which may be a condition precedent in a deed may be a condition subsequent in a will." *Jennings v. Gower*, Cro. Eliz. 219. And the rules of construction are so liberal that it has been held that "no precise form of words is necessary to create conditions in wills; but whenever it clearly appears that it was the testator's intent to make a condition, that intent shall be carried into effect." 2 Williams Ex. 1081. The case at bar should not turn upon any technical construction to be given the words used. The great object is to come at the intention of the testator. Nice grammatical constructions, which lead aside from this grand object, are to be disregarded. The testator provided some of his children with homes,—those, it is said, who were living in this state—distributing his real property among them. He gave Michael, living out of the state, one thousand dollars, requiring the plaintiff to pay seven hundred dollars of it, and giving the plaintiff his home

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farm on condition that he should pay it on or before the first day of April after the testator's decease. It was the evident intent of the testator that upon his death the plaintiff should be vested at once with the title and ownership of the farm, that the payment of the seven hundred dollars should be charged upon it, and that it should be held subject to such equitable lien. This is the construction that we think should be given to the will. It could not have been the testator's intent that in case he had died on the last day of March that the devisee should lose all benefit of the gift in case he did not pay the seven hundred dollars the next day. The plaintiff therefore had a sufficient title to maintain ejectment.

II. The question of variance raised by the defendant we think is controlled by the statute, R. L. ss. 1247, 1250. The plaintiff, although having but a life estate, is entitled to "recover on the merits according to his right." Judgment affirmed.

ROYCE, Ch. J., being absent, did not sit in this case, but having examined the opinion concurred therein.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTY OF WINDHAM,
AT THE
FEBRUARY TERM, 1883.

PRESENT :

HON. HOMER E. ROYCE, Chief Judge.

HON. JONATHAN ROSS,
HON. H. HENRY POWERS, } ASSISTANT JUDGES.
HON. WHEELOCK G. VEAZEY, }

TOWN OF WESTMINSTER v. TOWN OF WARREN.

Pauper. Appeal. Motion.

1. An order of removal was made on the 16th of October, 1880, and the warrant of removal served on the defendant the 25th of October, 1880, the officer stating in his return that the pauper's wife was "unab'le to be moved." On the 10th of June, 1881, the paupers were removed and a copy of the warrant left with defendant, *Held*, that the defendant was entitled to an appeal to the term of the County Court next following June 10th, 1881.
2. No certified copy of the order of removal was filed in the County Court. The copy of appeal contained the warrant of removal with the officer's return; the warrant recited the order of removal; and one of the justices signing the warrant certified that the copy of appeal was "a true copy of the original order of removal, &c., . . . made by us as appears by the original files and records." *Held*, that the defect in the copy of appeal was not such as to warrant a dismissal on motion.
3. No presumptions are made in regard to *ex parte* proceedings.
4. R. L. s. 2840, pauper, appeal from order of removal, construed.

APPEAL from an order of removal of one F. R. Buxton, a pauper, his family and effects. Heard on motion to dismiss the appeal, March Term, 1882, ROWELL, J., presiding. Motion sustained. The motion claimed the appeal should be dismissed; because the defendant had not filed in the County Court any certified copy of the order of removal, made October 16, 1880, recited in the copy of warrant of removal filed in court; because the warrant of removal, reciting the order of removal, was served on the defendant October 25, 1880, and it did not take an appeal "to the then next stated term of this court, begun and holden" at Newfane, on the second Tuesday of March, 1881; and because the defendant did not claim an appeal till the 10th of September, 1881.

The constable serving the warrant October 25, 1880, stated in his return that the wife of said Buxton was unable to be moved. On the 10th day of June, 1881, the constable transported the paupers to the town of Warren, lodged them with the overseer of the poor of said town, and left a copy of the warrant with him.

C. B. & C. F. Eddy, for the plaintiff.

Martin & Eddy, for the defendant.

The opinion of the court was delivered by

Ross, J. The statute, R. L. s. 2840, gives to a town aggrieved by "an order or warrant of removal" of a pauper the right to appeal therefrom. It is held in *Dorset v. Rutland*, 16 Vt. 419, that where the order of removal is not served agreeably to the statute, but instead thereof the warrant, reciting the order, is served by a copy, the return stating that the pauper was unable to be removed, the town on which the service is so made is not bound to regard it, such service being wholly unauthorized by the statute, but where, after the time had expired for serving the order of removal, the paupers are actually removed on another warrant issued on the order of removal, the town to which the paupers are removed can and must protect itself by an appeal from such warrant of removal, or sustain the burden of supporting

the paupers removed. That case in principle is identical with and controls this, so far as regards the plaintiff's second, third and fourth grounds for the motion to dismiss. The defendant's appeal from the service of the warrant of removal by the removal of the pauper—the only service thereof which was authorized, and which it was bound to regard—was seasonably taken. The preliminary proceedings, resulting in making the order of removal, are strictly *ex parte*, and do not affect or bind the town to which the paupers are ordered to be removed, until service is made on such town, as directed by the statute. The statute, s. 2835, provides that a copy of the order of removal, certified by the justices making it to be a true copy, shall be served on the overseer of the poor of the town to which the pauper is ordered to be removed, within thirty days after the same is made, unless the pauper is removed within that time. The statutory method of service must be followed to bind the town on which the order is made. But in *Dorset v. Rutland, supra*, it was held the order was not void, and only voidable, if not served by certified copy within the thirty days, if service was subsequently made by the removal of the pauper on a warrant issued after the thirty days had expired.

II. The plaintiff's first ground for moving to dismiss the appeal is that the defendant has not procured and filed a certified copy of the order of removal. Motions to dismiss are addressed to and reach such defects as are apparent upon the record as it exists when the motion is filed. There is nothing in this record that affirmatively shows that any such order of removal was ever made and drawn up in form by the justices of the peace who issued the warrant of removal. The justice certifying the copies of appeal asserts that the foregoing—which is the warrant of removal with the two officers' returns thereon, and which recited that an order of removal was made Oct. 16, 1880,—“is a true copy of the original order of removal . . . and the warrant of removal and officers' return thereon as made by us and as appears by the original files and records,” &c. It is not to be presumed or assumed against this certificate that there was among said records an order of removal, other than as recited in the

warrant drawn up in form. Nor do the defendant's pleas, when examined, furnish any aid to this ground of dismissal. One of them denies that any such order as is recited in the warrant was ever made. It is contended by the plaintiff that the maxim, *omnia præsumuntur rite esse acta* prevails in reference to the *ex parte* proceedings of a town in regard to orders of removal. It has generally been held that no presumptions were to be made in regard to such proceedings so far as they were strictly *ex parte*. The town to be affected had no opportunity to object to their regularity. They are wholly statutory, in the nature of proceedings *in rem*, up to the point of making the service required by statute upon the town to be affected adversely by the order, and it is incumbent on the moving town to show a strict compliance with the provisions of the statute in order to make such proceedings binding upon the town affected adversely thereby. But even if the ordinary presumption of the regularity of judicial proceedings should attach to such proceedings, while strictly *ex parte*, we do not think it should countervail the legal certificate of the justice of the peace who participated in making the order and warrant of removal. Hence, on the record of the case as made up when encountered by the motion to dismiss, we do not think such a failure in filing full copies of the record of the justices issuing the warrant of removal is shown as warranted the County Court in dismissing the appeal. On the service of the warrant of removal by actually removing and leaving the paupers with the defendant town for support, it was under a necessity of taking an appeal, or take the burden of forever supporting the paupers. It was not under an obligation of bringing into the County Court, as copies of the record in the case, what the justice making the record impliedly certified did not exist.

The judgment of the County Court is reversed, and the cause remanded to be further proceeded with in that court.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTY OF WASHINGTON,
AT THE
MAY TERM, 1883.*

PRESENT :

HON. HOMER E. ROYCE, Chief Judge.

HON. JONATHAN ROSS,
HON. WHEELOCK G. VEAZEY, } ASSISTANT JUDGES.
HON. JOHN W. ROWELL,

LYCOMING FIRE INSURANCE COMPANY v. MEDAD
WRIGHT & SON. SAME v. J. S. WHEELOCK.

*Insolvent Insurance Company. Foreign Receiver. Special
Plea. General Issue. Argumentative. False Represen-
tations. Statute must be Complied with by Foreign
Insurance Company.*

1. A foreign receiver of an insolvent insurance company may sue, and sustain an action, in this State, to recover assessments on premium notes, no creditor having intervened to prevent the prosecution of the suit.
2. Special pleas setting up false representations as to the financial condition of an insurance company, are not bad as amounting to the general issue.
3. A plea is not argumentative in alleging : " Wherefore the said defendants say that said premium note was and is void."

* By act of the Legislature, No. 95 of Public Acts of 1882, the time for holding the Supreme Court of Washington County was changed from August to May.

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4. The declaration was fatally defective in not alleging that the plaintiff company had obtained a license which was *in force*, to transact insurance business *at the time the contract was entered into*. Without the license required by the statute the company could not enter into a legal contract. Facts necessary to show a legal cause of action should have been averred.
5. A plea may by a *direct admission* of facts omitted or obscurely expressed, aid the declaration; but, if this plea admits that a license had been obtained, it does not admit that it was *in force* when the contract was made. The plea does not *directly admit* that a license had been obtained at any time.
6. Fraudulent representations as to the financial condition of an insurance company, and thereby inducing the defendant to enter into the contract, may be a full defence to an action to recover assessments.
7. An insurance contract made by a foreign insurance company before it has complied with the statute of this State, and obtained a license, filed a copy of its by-laws with the secretary of state, and become responsible for the acts and neglects of its agents, is void.
8. R. L. ss. 3610, 3618, foreign insurance companies, construed.

GENERAL and special assumpsit to recover assessments on premium notes. Pleas, general issue and four special pleas in bar. Heard on demurrer to the special pleas, March Term, 1883, REDFIELD, J., presiding. Demurrer overruled.

Charles W. Porter, for the plaintiff.

The action was properly brought in the name of the company. *Yeager v. Wallace*, 44 Pa. St. 294; *King v. Cutts*, 24 Wis. 627. The receiver was a statutory assignee, and is authorized "to prosecute and defend suits in the name of the corporation." Rob. Dig. 172; *Cuykendall v. Miles*, 26 Alb. L. Jour. 7.

This receiver, an officer of the court of the State of Pennsylvania, being by the laws of that State empowered to collect the assets of the plaintiff company, may maintain suits to collect such assets in this State, when no creditors claim the assets adversely to the receiver. *Hurd v. City of Elizabeth*, 41 N. J. L. 1; *Runk v. St. John*, 29 Barb. 585; *Exparte Norwood*, 7 Biss. 511; *Purple & Burrows, Admrs. v. Whitehead*, 49 Vt. 187; *Bank v. McLeod*, 27 Alb. L. Jour. 78. See 97 U. S. 628, 697; *Hale v. Lawrence*, 23 N. J. L. 416. It was not necessary to allege in the declaration that the plaintiff company had complied with the laws of the State, or was licensed at the time the premium note was given to transact business in this State. May Ins. s. 590;

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Williams v. Cheney, 3 Gray, 215 ; 72 Ind. 95 ; *Heyn v. Farrar*, 36 Mich. 261. Even if it ought to have been alleged, the omission is aided by the allegation in the last special plea as to the license to the company. Rob. Dig. 536, s. 144 ; Chitty Pl. 703-705, and notes. The first special plea amounts to the general issue. *Potter v. Stanley*, 1 D. Chip. 243 ; Chitty Pl. 492. And it does not show a defence. If good cause existed for rescinding the contract for fraud, it was the defendant's duty to surrender the policy and relieve the company from the risk. If loss had occurred, the company would have been liable. 58 Ill. 440 ; *Ins. Co. v. Woodward*, 83 Pa. St. 877. Whether a statute prohibiting an act renders a contract made in contemplation of the act void depends on whether, in view of the whole statute, the makers meant that the contract should be void in the sense that it could not be enforced. *Harris v. Runnells*, 12 How. 79 ; *Pangborn v. Westlake*, 36 Iowa, 546 ; *Mining Co. v. Bank*, 6 Otto, 641 ; *Bank v. Matthews*, 8 Otto, 627. See May Ins. s. 552 ; 81 Pa. St. 349.

Harlan W. Kemp and *John H. Senter*, for the defendants.

Receivers, whether appointed as this receiver was, under the statute by the court, or under the rules and practice of chancery, have no extra-territorial power of official action. The court appointing them can confer no authority to enable them to go into a foreign jurisdiction to take possession of the corporation's property. *Booth v. Clark*, 17 How. 322 ; *Farmers & Mechanics Insurance Co. v. Needles*, 52 Mo. 17 ; *Mosby v. Barrow*, 52 Texas, 396 ; *Edwards Receivers*, 6 *et seq* ; *High Receivers*, 239 ; *Story Conf. L. s. 513*. Administrators have no authority outside of the State in which they are appointed. *Cutter v. Davenport*, 1 Pick. 81 ; *Dixon v. Ramsey*, 3 Cranch, 318 ; *Riley v. Riley*, 3 Day, (Conn.) 74 ; *Mason v. Nutt*, 19 La. Ann. 41 ; *Stearns v. Burnham*, 5 Me. 261 ; *Sabin v. Gilman*, 1 N. H. 193 ; *Pond v. Makepeace*, 2 Met. 115. The plaintiff must allege all that is essential to his right of action. Gould Pl. c. 4, s. 7. The declaration is fatally defective in that it does not allege that the plaintiff had a license as required by statute. *Kent v. Lincoln*, 32 Vt. 591 ; Gould Pl. c. 4, ss. 13, 12. The pleas do not amount to the gen-

eral issue. 1 Chit. Pl. 480, 526 ; Gould Pl. c. 6, ss. 44, 56, 72, 80, 94 ; Lawe Pl. 586 ; *Reed v. Ins. Co.*, 54 Vt. 418 ; *Cummins v. Boyd*, 83 Pa. St. 372 ; *Maggs v. Ames*, 18 E. C. L. 598 ; nor are they argumentative. 3 Chit. Pl. 964, 968 b., 975 a., 988.

The opinion of the court was delivered by

ROYCE, Ch. J. The above cases were heard together. The first question made in argument is as to the right of the plaintiff to sue in its corporate name. When the receiver was appointed for the plaintiff, in 1881, there were statute laws in Pennsylvania, in which State the plaintiff corporation was located, which made it the duty of certain designated courts and judges, when it should be made to appear in the manner required by the statutes that any insurance company was insolvent, or the interests of the public so required, to decree a dissolution of such company and a distribution of its assets, and, if necessary, to appoint a receiver to take charge of its estate and effects and collect the debts and property due and belonging to it, with the power to prosecute and defend suits in the name of the corporation *or otherwise*, and do all other acts which might be done by said corporation, if in being, that were necessary for the final settlement of the unfinished business of the corporation. It is alleged that at a session of the court of common pleas held in and for the county of Lycoming on the 8th day of October, 1881, it appearing that the assets of the plaintiff company were not sufficient for carrying on its business, it was ordered to be dissolved, and J. A. Beecher, (who is prosecuting these suits in the name of the plaintiff), was appointed receiver, with the customary powers given to such an officer, and in accordance with the act of the assembly of the State of Pennsylvania in such case made and provided. By virtue of the act referred to in the order making the appointment, the right was conferred upon the receiver to prosecute suits in the name of the corporation as far as the court could confer power. The general rule is, that the jurisdiction of a receiver is limited to the jurisdiction making the appointment ; but exceptions have been frequently

recognized to that rule, growing out of the condition of the property of which he has been appointed receiver, the order making the appointment and the necessity of according to him extra-territorial jurisdiction. In *Ellis v. Boston &c. R. R. Co.*, 107 Mass. 1, an order for the appointment of a receiver of the entire line of the defendant company's road, which extended from Boston, Mass., to Fishkill, N. Y., was affirmed. The same question was so decided in *Wilmer v. Atlantic &c. Co.*, 2 Woods, 418, in which case the court say: "We think the courts of other jurisdictions would feel constrained, as a matter of comity, to afford all necessary aid in their power to put the receiver of the court in possession." In *Bagby v. Atlantic &c. R. R. Co.*, 86 Pa. St. 291, the right of a foreign receiver to sue in Pennsylvania was affirmed. In *Hurd v. City of Elizabeth*, 41 N. J. L. 1, it was decided that the legal effect of the appointment of a receiver in a foreign jurisdiction in transferring to him the right to collect the property passing under his control by virtue of such office, will be so far recognized by courts of this State (New Jersey), as to enable such officer to sustain a suit for such recovery. The cases where this right has been denied have generally been where creditors in the foreign jurisdiction have intervened. In such cases the courts have held that they would not allow the property of the receivership to be removed from their jurisdiction or appropriated by a receiver appointed in a foreign jurisdiction until the claims of citizens resident in the jurisdiction where the property is situate, were satisfied. Here, as we have seen, all the effects of the company passed to the receiver. No creditor has intervened to prevent the prosecution of the suit, or asserted any claim to what may be realized from its prosecution. Upon principle and authority we think the suit may be prosecuted in the name of the plaintiff.

It remains, then, to be determined whether upon the demurrer to the pleas they are to be held sufficient in form and good in substance. The special causes of demurrer assigned to the second plea are that it amounts to the general issue, and is argumentative in alleging: "Wherefore the said defendants say that said pre-

mium note was and is void." As we construe the plea, it substantially admits the making of the contract declared on and sets up matter in avoidance of it by stating that the defendant was induced to make it by the fraudulent representations made to him as to the financial condition of the company. It is elementary that such a defence may be specially pleaded. *Ohit. Pl.* 480 and 526; *Gould Pl. c. 6*, ss. 44, 56, 70, 72 and 80; *Read v. Ins. Co.*, 54 Vt. 418. And the fact that the defendant may avail himself of the same defense under the plea of the general issue does not necessarily preclude him from pleading it specially. See authorities before cited. When it is considered that it is to the advantage of the plaintiff that the defence should be specifically set out in a special plea, the court will not be astute in discovering or inventing technical reasons to deprive the defendant of the benefit of such a plea. Neither is the plea rendered argumentative by the use of the words specified in the demurrer. The word "wherefore" is defined as meaning "for which reason"; and applying that meaning the averment would read, "for which reason the defendants say that the premium note described in the declaration was and is void in law." The word "which" refers to the reason before stated in the plea, and the averment states a conclusion of law. It is not a professed averment of any issuable fact and leaves nothing to be ascertained by inference or argument.

The demurrer reaches back to the first substantial defect in the pleadings. It is claimed that the declaration is defective in not alleging that at the time of entering into the contract declared upon, the plaintiff company was licensed to transact insurance business in this State. The constitutional right of the legislature to pass such laws upon the subject of foreign insurance companies as were in force at the time the contract was entered into, is admitted. It was provided by statute then existing, s. 3610, R. L., that it shall not be lawful for any foreign insurance company to transact insurance business in this State, unless such company shall first obtain a license of the insurance commissioners authorizing the company to do so. The obtaining of such a license was made a condition precedent to the right of the plaintiff to

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enter into a legal contract. When the right of a contracting party to make a contract is dependent upon his compliance with the requirements of a statute of the State which prescribes duties to be performed by such party as a condition precedent to his right to make the contract, he must aver and prove a compliance with such requirements; he must set forth in his declaration all such facts as are necessary to show that he has a legal cause of action; and to show a legal cause of action it must appear that he had the legal right to make the contract upon which the action is predicated. *Kent v. Lincoln*, 32 Vt. 591.

The declaration is fatally defective in not alleging that the plaintiff company had obtained a license which was in force, to transact insurance business at the time the contract was entered into, unless the defect is cured by the last plea. The language which it is claimed has that effect is that, "before obtaining or receiving a license from the insurance commissioners authorizing said plaintiff to transact insurance business in this State and before entering into the contract declared upon," etc. This, it is claimed, is to be construed as an admission that such a license had been obtained. Treating it as such an admission, it does not cure the defect complained of. It was not enough to allege that the plaintiff company had obtained a license; it should have been alleged that it had a license which was *in force* at the time the contract was entered into. In *Ralston v. Strong*, 1 D. Chip. 287, it is said by Judge CHIPMAN that a plea may, by a *direct admission* of facts omitted or obscurely expressed, aid the declaration. That we think expresses the true rule; and applying it to the language here used, there was no such admission made that a license had been obtained at any time, so that the defect in the declaration was not cured by the plea. The case might well be disposed of by adjudging the declaration insufficient, but inasmuch as the whole case has been elaborately and ably argued, we have thought best to consider the question of the sufficiency of the pleas as a defence.

The first special plea alleges, in substance, that the defendant was induced to enter into the contract declared upon by the false

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and fraudulent representations made to him by the plaintiff company in relation to its financial condition and solvency; that it was represented to him that the plaintiff company then had a large surplus of money in its treasury and was solvent; that said representations were false, and that the plaintiff company did not have any surplus of money in its treasury, and was insolvent. The facts thus alleged being admitted by the demurrer, the defendants invoke the application of the principle that is as old as the common law—that fraud vitiates all contracts. Those facts constituted a full and perfect defence to the action. The question whether the contract was binding on the plaintiff company is not in issue and is not decided; and we make no comment on that portion of the plaintiff's argument further than to say that it is not always competent for the party who has been guilty of a fraud on the other party to an agreement, to avoid the contract on that ground. *Taylor v. Weld*, 5 Mass. 116.

The other pleas allege that the plaintiff company had not, at the time of the making of the contract declared upon, filed a certified copy of its by-laws with the Secretary of State, or become responsible for the acts and neglects of its agents, as required by the statutes. The duty of the plaintiff company to comply with the law in those respects is conceded; but it is claimed that a neglect to comply with it does not render the contract illegal so that it cannot be enforced. The claim made that a license is evidence that the party had done all that was necessary to his right to it need not be considered, because it does not appear that a license had been obtained. The general rule is that a contract which is prohibited by law is an illegal contract, and a party entering into such a contract cannot enforce it. It is competent for the legislature to determine the conditions upon which foreign insurance companies may transact business in this State. The conditions constitute a part of the law and they cannot qualify themselves to transact such business without complying with them. All business transacted by them without such compliance is an illegal business, and all contracts entered into as a part of such business are unenforceable. In *Harris v. Runnels*, 12 Howard, 79, it is said that, "Where a statute expressly prohibits an act, a

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contract in violation of its provisions is void." It is insisted, however, that this case does not come within the above rule because it is not within the intention of the statute. It is said in the case last cited, and re-announced in *Mining Co. v. Bank*, 6 Otto, 641, and *Bank v Matthews*, 8 Ib. 627, that the whole statute must be examined to discover whether it intended to prevent courts of justice from enforcing contracts in relation to the act prohibited. Upon examination of the statutes we are satisfied that the intention was to prevent the enforcement of contracts made by such companies until they had complied with the law. Unless such was the intention, the legislation was of no avail, and such companies might disregard it with impunity. The principal purpose of the statute was for the protection of the insured. In contracts of insurance the by-laws of the company are generally made a part of the contract; hence the necessity for the insured to have the opportunity of ascertaining what they are, so that he may comply with them. It is likewise important for him to know if the company is responsible for the acts and neglects of its agents, so that he may understand that when a representation is made to him by an agent, or an act is performed by such agent, he can rely upon it as a representation made or act performed by the principal. The conditions prescribed are, in our judgment, eminently reasonable, proper and just, and such as no solvent, responsible company has any right to complain of.

The pleas demurred to are sufficient, but the judgment overruling the demurrers is reversed *pro forma*, and causes remanded in order that the plaintiffs may apply for leave to amend their declarations.

Hamblet v. Bliss.

M. L. HAMBLET v. A. A. BLISS.*

Overdue Mortgage Notes. Mortgagee in Possession. Practice.

1. It is not presumed in law that an overdue note uncanceled in the hands of the payee was paid when it fell due; and the production of such notes and the mortgage securing them, in court, and proof of their due execution, establish *prima facie* the existence of indebtedness.
2. If a mortgagee, after condition broken, takes possession of the premises, and cuts the growing crops, such crops are his; and no change of possession is necessary to secure them against attachment by the creditors of the mortgagor; and this is so although the mortgagor continued to reside in the house on the farm, and the mortgagee, his son, boarded with him while he was cutting and gathering the crops.
3. The plaintiff having presented on trial evidence tending to prove a certain question, the court having intimated how it should rule, namely, that the facts proved did not constitute fraud in law against creditors, the defendant upon this intimation declining to go to the jury as to any disputed fact, the court ordered a verdict for the plaintiff; to which the defendant excepted. *Held*, that the exception does not bring into contention the ruling intimated by the court; that the defendant can only claim, that, admitting all to be true that the plaintiff's evidence tended to prove, he was not entitled to a verdict.

TRESPASS and case for a quantity of hay and oats. Trial by jury, September Term, 1881, REDFIELD, J., presiding. Verdict directed for plaintiff. The defendant justified on the ground that as a constable he sold on execution the property in question.

The plaintiff claimed that he was the owner of an overdue mortgage of the farm on which Leonard Hamblet lived, in the town of Worcester, Vt., and that there was due on said mortgage at the time he claimed he took possession, more than one thousand dollars. The plaintiff introduced evidence tending to prove the execution of the mortgage deed and notes secured thereby, by the said Leonard Hamblet, claimed to be owned by the plaintiff, and offered the same in evidence, which were admitted by the court. From said notes and mortgage, if nothing had been paid except what had been endorsed, there appeared to be due about the same

* Heard August Term, 1882.

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sum which the plaintiff claimed. Neither the plaintiff nor the said Leonard Hamblet were called as witnesses or testified as to the amount really due upon said mortgage, if anything; and no witness was called to prove the same. The plaintiff is the son of the said Leonard Hamblet.

The plaintiff introduced evidence tending to show that in July, 1879, he called witnesses, two or three, that he took possession of the farm on which his father then lived, under the mortgage aforesaid, for condition broken; that he then employed help to cut the hay and grain in question. The witnesses on cross-examination said that the plaintiff remained on the farm at that time only four or five days; that he was not there when the oats were cut, but that the hay was cut while he was there; that a little of the grass had been cut down, but none drawn to the barn when he so claimed to take possession; that at this time the said Leonard Hamblet was living in the house on the farm with his wife, and they boarded the plaintiff while he stayed, and also boarded the help that cut and gathered the crops while they were so doing, the plaintiff furnishing supplies when needed.

The defendant did not introduce any evidence in reference to said mortgage or notes; but introduced evidence tending to show the regularity of his proceedings as an officer, as set forth in the defendant's plea. Also, that the said Leonard Hamblet had lived on said farm for many years; that for some years preceding 1879 the plaintiff had visited his father's place in Worcester, remaining a few days during the haying season, and that his visit in July, 1879, had nothing unusual about it; that the said Leonard Hamblet had lived on said farm ever since, and that during all this time he was in possession of the house, and worked on the farm the same as formerly, all he was able to; that the hay and oats sold by the defendant were bid off by some one in the interest of the plaintiff or the said Leonard Hamblet, and that the said Leonard Hamblet used up and fed the same out on the farm. The witnesses whom the plaintiff hired to cut and secure the crops testified to the plaintiff's hiring and paying them for so doing; and the defendant introduced no evidence to contradict them, except as hereinbefore stated. The defendant claimed that the

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whole thing was a fraud, and was done by the plaintiff to prevent the said Leonard Hamblet's creditors from collecting their debts.

The court ruled that after a proof of the execution and delivery of the mortgage deed and notes, the producing the same by the plaintiff in court was *prima facie* proof that they were subsisting, and that there was the amount due which appeared upon the face of the papers; that as the defendant had introduced no evidence as to the amount due, that it was sufficient to entitle the plaintiff to recover; and that the plaintiff, being a mortgagee after condition broken, had the right to take possession and cut the crops and leave the hay and oats on the farm in the possession and under the control of the said Leonard Hamblet, and suffer him to use the same; and that the creditors of the said Leonard Hamblet could not attach and hold the hay and oats.

The premises were the old homestead of plaintiff's father and mother; and the plaintiff had from time to time resided there and made advances to them for their support and comforts, and had authorized them to get supplies at the stores on his credit, and that relation continued after he took possession of the premises. The defendant declining to go to the jury on question whether the plaintiff's mortgage debt was *bona fide* and overdue at the time the plaintiff entered upon the premises with his witnesses, and took the possession for the breach of the condition of the mortgage and made public proclamation of the fact, the court intimated that it would hold that plaintiff had the right so to enter, and if he did so on the assertion of a right, the standing grass and grain cut by him would, when severed, become absolutely his property; and that if he afterwards allowed his father to feed out such hay and grain on the premises and continue on the premises as aforesaid, it would not make the transaction fraudulent; under this intimation the defendant declining to go to the jury, as to any disputed fact, the court directed a verdict for the plaintiff for what plaintiff paid to redeem the hay and oats cut by him, to which the defendant excepted.

S. C. Shurtleff, for the defendant.

It is certainly true that if a party should declare on a prom-

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issory note that it was executed in due form of law, &c., and should omit to aver that the note though due had not been paid, the declaration would be bad on demurrer; the same rule holds good as to evidence. The court ruled that the proof was sufficient as to whether there was anything due on the mortgage. This was purely a question of fact for the jury. It is for the court to say what evidence is admissible; but as to whether or not evidence is sufficient to establish a fact is wholly for the jury. The oats were personal property before severance. *Parker v. Staniland*, 11 East, 362; *Graves v. Weld*, 5 B. & A. 105; *Saulisbury v. Matthewson*, 4 M. & W. 348.

J. A. & Geo. W. Wing, for the plaintiff.

We insist that the production of the note and proof of execution is *prima facie* proof that the note is still unpaid. *Evarts v. Bostwick*, 4 Vt. 349; 1 Jones Mort. s. 7-19; *Smith v. Jones*, 3 Gray, (Mass.) 517. The mortgagee after condition broken has the right at any time to enter on the mortgaged premises and gather the crops and sell and dispose of the same as his own, but must in equity account to the mortgagor for the same, upon redemption of the mortgaged estate by the mortgagor, and it is immaterial what the mortgagee did with the crops when harvested. *Wilson v. Hooper and Downing*, 13 Vt. 653; and reaffirmed in *Fuller v. Eddy*, 49 Vt. 11; see also *Lull v. Matthews*, 19 Vt. 322; *Hagar v. Brainard*, 44 Vt. 294; 2 Jones Mort. 1258; 4 Cush. 532; 9 N. H. 168.

The opinion of the court was delivered by

Ross, J. The defendant, upon the court's intimating what its ruling would be on certain matters involved, declined to go to the jury upon any disputed fact. He thereby admitted that all which the plaintiff's evidence tended to establish was proven. The court thereupon directed a verdict for the plaintiff, to which the defendant excepted. This exception does not bring into contention the ruling intimated by the court. No exception was saved in regard to that. It only saves to the defendant the right to contend, that if all the plaintiff's evidence tended to prove was true, he was not

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entitled to recover. The defendant now attempts to give the exception a wider scope, and to bring in question the correctness of the ruling which the court intimated it should make in the case; but this court, as has often been decided and promulgated, is bound by the record as certified by the trial court. This excludes from consideration the question of fraud, either in regard to the genuineness of the plaintiff's mortgage debt, or in regard to the honesty of purpose with which he took possession of the mortgaged premises. Fraud is not presumed to have entered into and tainted any transaction. Its existence is a fact to be established by evidence.

I. But if the question of fraud is not open to the defendant, he contends there was no sufficient proof of the existence of any mortgage debt due the plaintiff when he took possession of the mortgaged premises. The plaintiff introduced evidence tending to show the execution of the mortgage deed and of the notes secured thereby, and produced them in court. As the notes were overdue, when produced, the defendant contends that the presumption of law is, that they were paid when they fell due, although found in the hands and possession of the payee uncanceled. We do not understand that such is the presumption of law. A promissory-note is written evidence of indebtedness made and delivered by the maker to the payee. The purpose of making and delivering the note, is that the payee may have written evidence of such indebtedness. So long as it continues in the possession of the payee uncanceled, the law regards it as evidence of such indebtedness. When, therefore, the plaintiff produced the mortgage deed and the notes, uncanceled, in court, and proved their due execution, he produced sufficient evidence to establish *prima facie* the existence of the indebtedness witnessed thereby; he produced the identical evidence of such indebtedness, which had been furnished him by the maker. Against such evidence no presumption of payment arose from the fact that the day of payment had passed. Payment, under our statute and at common law, is a matter of defence, to be established by the defendant. No presumption of payment arises from the lapse of time, after

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the obligation or debt fell due, short of the period established by the Statute of Limitations. 1 Greenl. Ev. s. 15, 16 and 39. Mr. Starkie in his work on Evidence, vol. 3, p. 1090, says: "In the usual course of business, a security, where money is paid, is either delivered up to the debtor, or destroyed, and therefore where the fact of payment is otherwise doubtful, the possession of the entire instrument by the creditor affords a presumption that it is still unsatisfied." There was, therefore, sufficient evidence of a debt secured by mortgage to sustain the court in directing a verdict for the plaintiff.

II. The defendant contends there was not sufficient evidence of a change of possession of the property attached by the defendant to uphold the action of the court in directing a verdict for the plaintiff. The plaintiff's evidence tended to show that he took possession of the mortgaged premises under his overdue mortgage, and cut and gathered the hay and oats which the defendant attached as the property of the mortgagor. The law day having run upon the mortgage, the title to the premises, at law, became absolute in the plaintiff. He took possession as the legal owner. The growing crops were his, as much as the land on which they were standing. Whatever may be the legal character of annual crops, there cannot be any doubt but they pass with the land to a purchaser who takes the title and possession of the land while they are still standing upon it. A mortgagee who takes possession of the mortgage premises under his mortgage for condition broken, is such purchaser. At law he is the absolute owner in possession. In equity also he is the owner of the crops growing, and to be grown by him upon the premises while in possession, and only accountable to the mortgagor for the rental value of the premises, on the redemption thereof. It is true that such crops belong to the mortgagor who is allowed to remain in possession, and severs such crops. This is all that is decided in *Cooper v. Cole*, 38 Vt. 185, relied upon by the defendant. Although the plaintiff in that case had foreclosed his mortgage, he had never taken possession under it, but had agreed with the mortgagor that he should foreclose, but that the mortgagor should still have the

right to redeem the same as before the foreclosure, but take a lease of the premises in which the plaintiff reserved the crops as security. The court treated it, as they always do such make-shifts, as not having in the least changed the relation of the plaintiff in regard to the mortgage premises, but that he was still a mortgagee out of possession, and that the crops grown thereon by the real mortgagor in possession were attachable by the creditors of the latter. In the case at bar, the crops, over which this contention is, were never in the possession of the mortgagor when attachable by his creditors. While growing, such crops are exempt from attachment. R. L. s. 1556. They were severed by the plaintiff while in possession under his mortgage, so that they were his property when they first took an attachable form. Since they never were attachable as the property of the mortgagor, it is difficult to understand what application the doctrine requiring a change of possession of personal property to prevent its attachment by the creditors of the vendor, has to the facts of this case. The mortgagor was not the vendor of the *hay and grain* attached. If a change of possession were required, the facts which the plaintiff's evidence tended to show, were sufficient to protect it from attachment.

The judgment of the County Court is affirmed.

Roakes v. Bailey & Newcomb.

IN RE JAMES ROAKES, INSOLVENT, v. BAILEY & NEWCOMB,
CLAIMANTS.

Insolvent. Application of Payment.

The intent of the debtor prevails over that of the creditor as to the application of payments ; *and it may appear by implication* ; thus, a partnership having dissolved, one of the partners succeeding to the business of the firm, an old debtor, without notice of the dissolution, and not having notice through the fault of the successor, continued to buy, and also to make payments supposing them to apply on the partnership debt,—the law will apply them as he intended.

APPEAL from the Court of Insolvency. Heard by the court, March Term, 1882, REDFIELD, J., presiding. The court reversed the judgment of the Court of Insolvency, and rendered judgment for Bailey & Newcomb for the full amount of their claim, and adjudged that all the payments made by said Roakes after May 4th, 1880, should be applied in reduction of the account of Newcomb, accruing after that date. Roakes was an insolvent debtor. An assignee was settling his estate. The partnership of Bailey & Newcomb was dissolved May 4th, 1880. Newcomb was their successor. Roakes was indebted to both. Bailey & Newcomb had secured their debt by attachment more than sixty days before Roakes filed his petition in insolvency. Newcomb and Bailey & Newcomb claimed that the payments should be applied as applied by Newcomb ; the assignee and Roakes, that they should be applied on the debt of Bailey & Newcomb. Bailey & Newcomb had a meat market in Montpelier village, and sold provisions to Roakes on credit ; in most cases from their cart at his house. He made payments to them from time to time on account. The business of the firm was done mostly by Newcomb and the men in their employ. He continued to collect the old debts, to occupy the same place for business, and to employ the same help and team as the firm had. Notices of the dissolution of the partnership were

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published in two of the Montpelier weekly newspapers; and the sign, "Bailey & Newcomb" was taken off from the door to the market, and the sign, "F. L. Newcomb," put in its place. Newcomb kept a new set of books with his customers, but used the old "pass-book" as stated in the opinion. The Court of Insolvency held that the payments should be applied *pro rata* towards the claims of Bailey & Newcomb and of Newcomb. The other facts are stated in the opinion.

Geo. W. Wing, for the assignee.

T. R. Gordon, for Roakes.

The payments should be applied on the debt of Bailey & Newcomb. The debtor's intent may be implied from the circumstances. 7 Waite Act. & Def. 414; 74 Ill. 238; 2 Met. 168; 5 Vt. 149; 24 Vt. 642; 23 Mo. 185; 1 Hill, 572; 1 Term, 332; 13 Vt. 15.

Charles W. Porter, for Bailey & Newcomb, cited on the application of payments. Rob. Dig. 524; 5 Denio, 470; 2 A. R. Mar. (Ky.) 277.

The opinion of the court was delivered by

POWERS, J. I. Upon the dissolution of a firm, its old customers lose no legal rights against it until they have notice in fact of the dissolution. A debtor paying money to his creditor has the primary and paramount right to direct the application of his money to such items or demands as he chooses. This direction may be given in express terms, or it may appear by implication from the circumstances of the transaction. If the debtor pays with one intent and the creditor receives with another, the intent of the debtor shall govern. If no application is directed by the debtor, the creditor may make it.

These general rules upon the subject are clearly deducible from the authorities. *Newmarch v. Clay*, 14 East, 240; *Taylor v. Sandiford*, 7 Wheat. 14; *Boutwell v. Mason & Scott*, 12 Vt. 608; 1 Am. Lead. Cases, 329, *et sequentia*.

II. Roakes had no notice of the dissolution of the firm of Bailey & Newcomb with whom he had dealt, and supposed the payments made to Newcomb were to apply on Bailey & Newcomb's account.

Bailey & Newcomb before the dissolution had entered upon a "pass book" held by Roakes the goods sold to Roakes, with the prices and also the cash paid on account by Roakes. After the dissolution like entries on both sides of the account were made upon this book by Newcomb, the successor of Bailey & Newcomb. Roakes had no opportunity to direct in express terms the application of his payments after the dissolution, as he had no knowledge that there had been a dissolution. He all the time supposed his creditor was Bailey & Newcomb. He all the time intended that his payments should apply upon their account. It was the fault of Newcomb that Roakes was ignorant of the dissolution, and Roakes cannot be deprived of the opportunity to elect where his payments shall go by the fault of his creditor.

When Newcomb, therefore, applied the payments made by Roakes after the dissolution to his own private account, he diverted the money from the destination that Roakes gave it. This he could not do. As said by Ch. J. REDFIELD, speaking of the creditor's right of application when the debtor gives no express directions, in *Boutwell v. Mason & Scott*, 12 Vt. 608, "The creditor may make such application of the money as he will, *unless the circumstances under which it was paid, show an intention on the part of the debtor to have it applied to some particular demand*" Here the circumstances show conclusively Roakes' purpose to pay Bailey & Newcomb and no one else. The right of the creditor to make the application never existed.

The judgment of the County Court is reversed, and judgment for the claimants for the amount of their claim as established by the Court of Insolvency, less the payments made after their dissolution, the computation to be made by the clerk; and it is ordered that this judgment be certified to the Court of Insolvency.

TOWN OF MARSHFIELD v. TOWN OF MIDDLESEX.*

Pauper. List.

1. Under the act of 1862 whereby the listers were directed to set dogs in the grand list at the sum of \$1 each, dogs were "ratable estate" within the meaning of the pauper law.
2. R. L. s. 2811, (G. S. c. 19 s. 1,) paupers,—list ; Act of 1862, dogs taxable,—construed.

APPEAL from an order of removal of George Loveland, as a pauper, from the town of Marshfield to the town of Middlesex. To this order of removal the defendant filed two pleas : first, that said Loveland had, at the time of said order of removal, no legal settlement in the town of Middlesex ; second, that at the time of said order of removal the said George had not come to reside in the town of Marshfield. Trial by jury, September Term, 1881, REDFIELD, J., presiding. Verdict for the plaintiff. The facts are stated in the opinion of the court.

J. P. Lamson and S. C. Shurtleff, for the plaintiff.

H. W. Heaton, and Heath & Carleton, for the defendant.

The opinion of the court was delivered by

POWERS, J. This was an appeal from an order of removal of a pauper from Marshfield to Middlesex.

To prove that the pauper had a legal settlement in the town of Middlesex, the plaintiff offered evidence tending to show that the father of the pauper had a grand list in the defendant town amounting to the sum of three dollars and upwards, besides his poll, for five years in succession. In the year 1872, one of the five years in question, the father's list was made up as follows :

Real estate, \$2.40 ; personal property, .30 ; one dog, \$1.00 ; one poll, \$2.00,—\$5.70.

* Heard August Term, 1882.

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It is insisted by the defendant that the item of one dollar for one dog was not part of the father's ratable estate, and, therefore, rejecting this item, he had not the requisite list for that year.

The fourth subdivision of section one of chapter 19, G. S., provides that :

“ Every person of full age who shall reside in any town in this State, and whose ratable estate held in his own right, the percentage of the value of which, besides his poll, shall be set in the list of such town, at the sum of three dollars or upwards, for five years in succession, shall thereby gain a settlement in such town.”

Ratable estate within the meaning of this statute is taxable estate. It is the real and personal property that the Legislature designates as taxable. It is not questioned that the Legislature may declare what property shall be taxed and fix the method of appraising and assessing it. Farms, horses, and money obligations are “ ratable estate,” merely because the Legislature has ordained that such property shall be taxed. The general law declares that ratable estate shall be set in the list at one per centum of its value as appraised by the listers. But the Legislature had the right to provide that it should be set in the list at ten, fifty, or one hundred per centum of such value, or declare that horses should be set in the list at fifty dollars, and other personal property at specified values as was years ago done under the old law. Indeed, the whole jurisdiction over the question is left to the Legislature to determine what shall be taxed, as well as the rate and method of its appraisal subject to the limitation that it be equal and uniform.

This fourth subdivision does not say “ whose ratable estate ” one per centum of the value of which, &c., but “ *the* percentage of the value of which ” shall be set in the list for five years shall establish a settlement, thus leaving the percentage unfixed, so that whatever property the Legislature at any time may declare to be *ratable* or taxable, and at whatever *per centum* it may fix as its taxable value, it may be included under the general language used in the statute.

Under the act of 1862, in force when this list was made up, the listers in each town were directed to set dogs in the grand list at

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the sum of one dollar each. This act by its own proper vigor made dogs "ratable estate" within the meaning of said fourth subdivision of section one of the pauper law, and also defined "the percentage" at which this ratable estate should stand in the list.

Thus the father of the pauper had the requisite grand list to give him a legal settlement in Middlesex, and the pauper took this settlement derivatively, and was properly removable.

Judgment affirmed.

STATE v. TIMOTHY J. MURPHY.*

Criminal Law. Information. Amendment. Allegation of Time under a Scilicet.

1. The state's attorney filed an information under the liquor law against the respondent, as "Thomas J.," for maintaining a nuisance. The respondent pleaded in abatement that his name was "Timothy J." *Held*, that the information was amendable.
2. An information alleging the offence to have been committed, "heretofore, to wit, on the 17th day of September, A. D. 1881," is sufficient, on motion in arrest of judgment.
3. R. L. ss. 3836, keeping a nuisance; 3865, form of complaint; 3857, amendment of complaints, &c., construed.

INFORMATION filed by the state's attorney against the respondent for maintaining a nuisance. Trial by jury, September Term, 1881, REDFIELD, J., presiding. Verdict, guilty. The case is stated in the opinion.

Clarence H. Pitkin, for the State.

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Geo. W. Wing, for the respondent.

The opinion of the court was delivered by

Ross, J. I. The state's attorney filed an information against the respondent by the name of Thomas J. Murphy, under s. 3836, R. L., for keeping and maintaining a nuisance. To this information the respondent filed a plea in abatement alleging that his name is Timothy J. Murphy, and not Thomas J. Murphy. The court allowed the state's attorney, on his motion, to amend the information by substituting Timothy in the place of Thomas, and overruled his plea. To this the respondent excepted. This exception is not maintainable. We do not place the decision upon s. 3865, R. L., which prescribes the form for complaints under s. 3836, and declares that the same may be amended either in form or substance at any stage of the proceedings. No doubt in the general term "complaints" the legislature intended to include informations and indictments for offences against that section of the statute. No good reason can be assigned why the power to amend should be confined to complaints rather than informations and indictments for the same offence. But complaints have a well defined meaning and so have informations and indictments in practice, and as used in the statute. In construing a criminal statute, we prefer to keep within the language so long as there is no necessity to go beyond it, and to leave to the Legislature the work of making clear that they mean to give the court the same power to amend informations and indictments for offences against s. 3836, that it has conferred to amend complaints. Hence, we do not decide whether the information was amendable under this section. By s. 3857, power is conferred upon the court to amend "complaints, informations or indictments" founded on the provisions of chapter 169, which contains s. 3836, except as to matter of substance. The name of the person charged is not a matter of substance. It can only be taken advantage of by plea in abatement. As said by the court in *Turns v. Commonwealth*, 6 Met. 224: "The issue for the jury of trials is not what is the individual's name, but whether the person who has pleaded in chief on his arraignment is guilty of the offence charged upon him. The conviction, there-

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fore, must follow the indictment. The exception can be taken only in abatement." It could not be reached by demurrer. *Scott v. Soons*, 3 East, 111. It, at most, is a formal defect within the scope of *State v. Arnold*, 50 Vt. 731. Such defects and greater in informations were amendable at the common law. Says Mr. BISHOP in his work on Criminal Procedure, vol. I, s. 611: "On matters of amendment the information stands at the common law on entirely different ground from the indictment. The public officer by whom the information is presented and prosecuted being always in court, it may be amended on his application to any extent which the judge deems to be consistent with the orderly conduct of judicial business with the public interests and with private rights. . . . If the defendant has objected to something by plea in abatement, it may be amended to cure the defect." This statement of the power to amend informations at the common law is fully supported by authorities. *Reg. v. Stedman*, 2 Lord RAYMOND, 1807; *Rex v. Seawood*, 1b. 1472; *Rex v. Harris*, 1 Salk. 47; *State v. Weare*, 38 N. H. 314. We do not think that s. 3857, was intended to lessen the power of the court at the common law to amend for defects in informations not of substance. Both by this section of the statute and at the common law the court had power to allow the amendment to be made.

II. After verdict the respondent filed a motion in arrest of judgment and sentence, because the information, although following the form prescribed in s. 3865, alleges the time at which the offence is charged to have been committed, in this language, "heretofore, to wit, on the 17th day of September, A. D. 1881." The court overruled the motion, to which the respondent excepted. Lord Ch. J. HOBART, in *Stukeley v. Butler*, Hob. 172, speaking of the use of a *videlicet* or *scilicet*, says: "Her natural and proper use is to particularize that that is before general, &c., or to explain that that is doubtful or obscure." Hence, to make application of this definition, which has been copied into most of the elementary works, the information charges that the respondent, "heretofore,"—a general term,—"to wit" that is, to be particular or definite, "on the 17th day of September, A. D. 1881," &c. This is charg-

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ing the commission of the offence at a definite and particular time. In 1 Bish. Crim. Proceed. s. 257, it is said: "when the precise time is material and enters into the substance of the description of the offence, there the time, &c., though laid under a *scilicet*, is conclusive and traversable, and it will be intended to be the true time and no other." The information was not lacking in substance in this respect, and sufficient when encountered by a motion in arrest. The court properly overruled the same.

The result is that the respondent takes nothing by his exceptions, and the same are overruled, and judgment rendered on the verdict.

STATE v. A. C. DEWEY.

Criminal Law: Intoxicating Liquor.

The Revised Laws took effect August 1st, 1881; this complaint was dated September 15th, 1881, charging "an offence against the provisions of chapter ninety-four of the General Statutes,"—the furnishing of intoxicating liquor, &c. The respondent moved to quash; the state's attorney, to amend by erasing the words, "*of chapter ninety-four*," and the word, "*general*." Held, as there was a statute in force at the date of the complaint making the doing of the act, with which the respondent was charged, an offence, that the italicised words did not vitiate the complaint, but should be treated as surplusage.

COMPLAINT for furnishing intoxicating liquor, &c. Heard on motion to quash. March Term, 1882, REDFIELD, J., presiding. Motion overruled. The facts are sufficiently stated in the opinion, except that the complaint was dated Sept. 15, 1881.

State's Attorney, for the State.

Geo. W. Wing, for the respondent.

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The opinion of the court was delivered by

ROYCE, Ch. J. The complaint, before it was amended by leave of court, charged the respondent with an offence against the provisions of c. 94 of the General Statutes of Vermont, in relation to the traffic in intoxicating drinks. The respondent moved to quash, for the reason that c. 94 of the General Statutes was not in force at the date of the complaint and warrant, but had been repealed. The state's attorney thereupon moved to amend by striking out the words "*of chapter ninety-four*" and "*general*" before the word statutes; and leave was granted to make the amendment. The motion to quash was overruled and exceptions taken. The respondent also excepted to the ruling of the court allowing the amendment.

It is conceded that there was a statute in force at the date of the warrant and complaint, which made the doing of the act, with which the respondent was charged, an offence. Did the averment that the offence was against the provisions of a chapter of the General Statutes that had been repealed vitiate the complaint so that no conviction could be had under it?

The general rule is that all descriptive averments in an indictment must be proved as laid; but if an averment may be entirely omitted without affecting the charge against the prisoner or detriment to the indictment, it may be disregarded in evidence, and may be rejected as surplusage, if the indictment would be good without it. 31 N. H. 520; 4 Pick. 252; 1 Whart. C. L. s. 622. In *People v. Reed*, 47 Barb., it was decided that it was no valid objection to an indictment that it recited the wrong year in which the statute, under which the defendant was indicted, was enacted. The words which were stricken out were unnecessary; the State was under no obligation to aver or prove them. The complaint being good with those words in it, the rights of the respondent were not prejudiced by allowing them to be stricken out. This view makes it unnecessary to consider the question of the power of the court to allow the amendment to be made.

The motion to quash was properly overruled, and the respondent takes nothing by his exceptions.

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O. G. FASSETT v. TOWN OF ROXBURY.*

Highway. Notice. Negligence.

The notice set forth that the plaintiff was injured while travelling on a highway "leading from the west, or depot village" in the town of R. to the depot village in the town of N.; "when near the railroad crossing which is between the dwelling house of Azro Simonds in said town of Roxbury, and the dwelling house of" Latham in said town, "and on the easterly side of said railroad crossing, and between the said dwelling house of the said Latham, and about five or six rods from said railroad crossing"; that his horse and wagon "were thrown off the bank on the easterly side" of the highway; that there was a steep bank on the "easterly side of the highway at that point" not "protected by any railing or other guard"; that the highway was insufficient because there was no railing; and that "I" * * * was "severely injured in my spine near my shoulders so that I have had no use of my arms," and "was otherwise injured in and about my back and spine." *Held,*

1. The notice was sufficient as to the place of the accident;
2. And, as to the bodily injuries.
3. The charge of the court should be taken as a whole.
4. The question of contributory negligence, as a general rule, cannot resolve itself into one of law, but must be submitted to the jury, with instructions.
5. The terms, "ordinary and common prudence," "ordinary care and prudence," explained.

CASE for injury on a highway. Plea, general issue; and trial by jury, September Term, 1881, REDFIELD, J., presiding.

Verdict for the plaintiff.

The notice as to the place of accident and injuries was:

"An open, public highway in said town of Roxbury, leading from the west, or depot village in said town of Roxbury, to the depot village in the town of Northfield, and that when near the railroad crossing which is between the dwelling house of Azro Simonds in said town of Roxbury, and the dwelling house of Marshall Latham in said town of Roxbury, and on the easterly side of the said railroad crossing, and between the said dwelling house of the said Marshall Latham and about five or six rods from said railroad crossing, my horse and wagon were thrown off the bank on the easterly side of said highway; said highway being insufficient and out of repair at that point, in that there was a steep bank on the easterly side of said highway at that point; and the said highway at

*Heard August Term, 1882.

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that point was not protected by any railing or other guard to prevent teams from going over the said bank; and by said accident, solely caused by the insufficiency of said highway, my wagon was broken and injured, both of the shafts were broken, the cross bar was broken, the dash was broken over, and the spokes were broken out of both wheels of said wagon, and the wagon was otherwise scratched and marred, and I was thrown from my wagon, and severely injured in my spine near my shoulders so that I have had no use of my arms since that time, but have been, and am now, confined to my bed, entirely helpless, and I was otherwise injured in and about my back and spine, and internally, and I was so severely injured that the clothes had to be cut from my back."

The defendant's counsel requested the court to charge the jury :

" If the plaintiff knew he was approaching a railroad track, and did not at a safe distance therefrom, before crossing the same, use all reasonable means to ascertain whether a train was approaching; and having found such train so approaching, did not stop or turn his horse around so as to avoid such approaching train; and if his neglect to so ascertain and stop and turn his horse around contributed in any degree to the accident, the plaintiff cannot recover."

The facts and charge of the court are sufficiently stated in the opinion.

Dillingham, Pitkin, and Senter, for the plaintiff.

Stanton, Plumley, Heath & Carleton, for the defendant.

The opinion of the court was delivered by

ROWELL, J. Defendant contends that the notice does not designate the place of injury with sufficient certainty, nor sufficiently describe the bodily injuries for which recovery is sought. It is claimed that the notice locates the place of injury *between* a point about five or six rods easterly of the railroad crossing and Latham's house, thus ranging a distance of some thirty-four or thirty-five rods, it being about forty rods from the crossing to Latham's house. We think there is no great ambiguity in the notice in this respect, and that it is not very probable that the selectmen were unable to determine therefrom with reasonable certainty the exact place where plaintiff claimed to have been injured. If we interpolate the words, *there and*, after the word

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“between,” in the notice, all ambiguity will be removed, and the place located five or six rods east of the crossing, where the accident in fact happened. But if we construe this notice according to the defendant’s contention, it is then sufficient, on the authority of *Reynolds v. Burlington*, 52 Vt. 300. The bank commences at the crossing and extends northerly, along the easterly side of the highway, for a distance of about twenty rods, gradually diminishing in height. The notice states that plaintiff’s horse and wagon were thrown off this bank, and the insufficiency complained of is, the want of a railing along the same. The distance between the northern terminus of this bank and a point thereon six rods easterly of the crossing is fourteen rods. Thus, on defendant’s claim, the place of accident is confined to this space of fourteen rods, all of which is dangerous from lack of a railing. As said in *Reynolds v. Burlington*, the town had every advantage in respect to the condition of the road that it could have had if the point had been designated by a monument. Wherever the accident might have happened on that fourteen rods, there the same defect existed as at the point where the evidence showed it did in fact happen.

Plaintiff claimed to recover for an injury to his spine *between* his shoulder blades, and for the damaging consequences to himself resulting therefrom. In his notice he says he was severely injured in his spine *near* the shoulders, and that by reason thereof, he had had no use of his arms, and had been confined to his bed, entirely helpless. His testimony tended to show that by reason of the injury to his spine, his hands and arms were partially paralyzed. The statute provides that the part of the body injured shall be given in the notice, which must be taken to mean, given with reasonable certainty. Now, *between* the shoulder blades is *near* the shoulders; and the statement that plaintiff’s spine was injured *near* the shoulders, designates the part of the body with sufficient certainty for all purposes for which the injured part is required to be given. The extent of the injury, and its effect on the plaintiff, are also sufficiently given. And the injury being thus sufficiently described, recovery may be had for the evil resulting to the plaintiff by reason thereof.

The first request to charge was properly refused. It was but another of the many attempts in cases of this kind to have the court rule as matter of law what all the cases in this State say is mainly a question of fact. How could the court say as matter of law that if plaintiff, having found that a train was approaching, "did not stop or turn his horse around so as to avoid such approaching train," he could not recover? Perhaps he was so situated that in point of fact the only prudent course left to him was to do just what he did do—cross the track. Indeed, the jury has said that he was not lacking in prudence in so doing. Shall the law then step in and say, that notwithstanding he acted prudently in fact yet he was negligent in law? Care and prudence always vary according to the exigencies that require vigilance and attention, conforming in amount and degree to the particular circumstances in which they are to be exercised, and from the very nature of the case, as a general rule, to which the case in hand affords no exception, the question of contributory negligence cannot resolve itself into one of law, but must needs be submitted to the jury with instructions. This is the holding of all the cases on the subject in this State. This disposes of all the other requests, as they all embody the same idea as the first, and call for substantially the same ruling. The charge is criticised because it contains a few such expressions as these: * * * "whether he acted recklessly and imprudently. Did he omit to do what a man of *ordinary and common* prudence would have done? * * * If you find that plaintiff * * * was wanting in care and prudence, and did what a man of *ordinary* caution and prudence would not have done, he cannot recover." It is claimed that these expressions erected a false standard by which to measure the plaintiff's conduct, and one that has been condemned in *Briggs v. Taylor*, 28 Vt. 180, and later cases. It may be, if these expressions constituted the key-note of the charge, and the degree of care and prudence that the plaintiff was bound to exercise had not been otherwise defined, that the criticism would be just. But these are only a few expressions selected from the whole charge on this subject, the general tone and tenor of which was up to the legal mark in this behalf; and it is not

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profitable nor salutary to look into a charge with a carping disposition, but it should be taken as a whole, and although it may contain some expressions that, taken alone, would be error, yet if as a whole it breathes the true spirit and doctrine of the law, and there is no fair ground to say that the jury has been misled by it, it ought to stand. But what do the terms, "ordinary and common prudence," "ordinary caution and prudence," and the like, import? It is said in *Folsom v. Underhill*, 36 Vt. 580, that the term, "ordinary care and prudence," *when rightly understood*, expresses the true legal measure of care and prudence that a plaintiff is bound to exercise in cases where the question of contributory negligence is involved. In *Coates v. Canaan*, 51 Vt. 131, it is said that those words mean such care and prudence as the average prudent man would exercise under like surroundings and in the like situation. The term, "ordinary prudence," was used in the charge in that case, but it was defined to the jury to mean such prudence as prudent men ordinarily exercise in like circumstances. In *Reynolds v. Burlington* it is said that the care and prudence that the law regards as "ordinary," are such as prudent men are accustomed to exercise on like occasions. Thus we see that the words, "ordinary care and prudence," and the like, *when rightly interpreted*, convey the true idea and doctrine of the law on this subject, and import that degree of care and prudence that careful and prudent men would exercise in the same circumstances. In this case the court defined the measure of care and prudence that the plaintiff was bound to exercise in the following language: "It is always incumbent upon the plaintiff that he should act as a prudent and cautious man would have acted in like circumstances and should be on the lookout for danger that he might reasonably expect would come." The exceptions show that this was a repetition of what the court had already told the jury. The court further said to the jury: "Was there anything about this horse that required caution and prudence on the part of a prudent man in using it, and did the plaintiff exercise that caution and prudence in reference to making this crossing?" Thus the court laid down the true rule for the jury to follow, and the expressions com-

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plained of, taken in connection with the whole charge on that subject, did not detract therefrom, nor mislead the jury.

Judgment affirmed.

DAVID R. FAY, ADMR. v. J. V. R. KENT.

Pleading. Declaration. Survival of Actions where Death of Intestate is Caused by Negligence of Defendant.

The declaration alleged that the defendant negligently dug an unsafe and dangerous hole into a bank for sand, "within the limits of the highway," about fifteen rods from a school house, while a school, composed mostly of young children, was in session; that some of the children were in the habit of passing over the highway, and were liable to go into the hole without knowledge that the same was unsafe; that the deceased, being one of the school children and under nine years of age, "while passing on and over said public highway and bank, did enter into said hole and excavation, as he had a lawful right to do" and that the sand and earth covering the same fell in and killed him; that his death was caused solely by the defendant's negligence; and that the plaintiff, as administrator under the statute, sues for next of kin. *Held*, bad on demurrer; that there was no averment that the defendant's act prejudicially affected any legal right of the deceased, as that the highway was rendered unsafe, &c.

ACTION under the statute, G. S. c. 52, ss. 15, 16, 17, (R. L. ss. 2138, 2139). Heard on demurrer to the defendant's pleas, March Term, 1881, REDFIELD, J., presiding. Demurrer overruled. Copy of the amended declaration:

"Also in a further plea of the case brought on sections 15, 16 and 17 of chapter 52 of the General Statutes of this State, for that the defendant heretofore, to wit, on the 29th day of July, A. D. 1879, at Calais, in the County of Washington, excavated for sand by digging into the bank and leaving, without right, a certain other hole and excavation in said bank, unsafe and dangerous as hereinafter set forth, within the limits of the public highway, at a point about fifteen rods from the school house . . . ; that a school was then, and for a long time before had been, in

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session in said school house composed mostly of young children, and that some of said children for a long time before had been, and then were, in the habit of passing on and over said public highway, and on and over said bank as they had a lawful right to do . . . ; that the sand and earth covering such last mentioned hole and excavation, as the same was then and there left by the defendant as aforesaid, was liable to fall into such hole and excavation, and thereby to injure and kill any person in the same ; and that such children from such school in passing on and over such public highway and such bank as aforesaid, were liable to enter into such last mentioned hole and excavation without any knowledge that the same was unsafe and dangerous as hereinafter set forth ; that the defendant was careless and negligent in leaving such last mentioned hole and excavation as aforesaid ; and that such last mentioned hole and excavation as left as aforesaid by the defendant was unsafe and dangerous for any person entering therein, by reason of the liability of the covering of said last mentioned hole and excavation to fall in as aforesaid, and so continued until the death of said Henry K. Gray as hereinafter set forth ; that afterwards on the same day said Henry K., then under the age of nine years, and the son of Otis Gray of said Calais, and one of said children then attending said school, while passing on and over said public highway and bank did enter into said last mentioned hole and excavation, as he had a lawful right to do, he, the said Henry K., having no knowledge that the same was unsafe and dangerous as aforesaid ; and the sand and earth covering the same as aforesaid, did then and there fall in and upon said Henry K., then and there killing the said Henry K. And the plaintiff, as such administrator, avers that the death of said Henry K. Gray was solely caused by the falling upon him of said sand and earth, as aforesaid, through the negligence and carelessness of the defendant as aforesaid ; and so the plaintiff, as such administrator, avers that the death of said Henry K. Gray was then and there solely caused by the negligence and carelessness of the defendant as aforesaid. And the plaintiff, as such administrator, avers that said Otis Gray is the father and next kin to said Henry K. Gray, and that he, the said Otis, was damaged by the death of said Henry K.," &c.

Defendant's plea, in part :

Yet the defendant says, protesting, that said excavation was made within the surveyed limits of said highway, that said excavation was made on the land of one C. M. Gray, of said Calais, in a high sand bank on said Gray's land, and more than ten feet higher than the travelled part of said highway, and more than twenty-five feet from the travelled track in said road where people passed and repassed in passing over said highway, and in no manner interfering with the travel on said highway, or making the same dangerous to persons travelling on said highway ; that part of said sand in said sand bank was suitable for the purpose of plastering buildings, and some of it was not suitable for such purpose ; that the sand suitable for plastering was in veins surrounded by sand of inferior quality ; and that the owner of said land had, for more than fifteen years prior to July 29, 1879, at Calais aforesaid, and yearly and every year granted licenses to people living in Calais aforesaid, to enter into his land and excavate for sand for plastering purposes ; and that for that purpose various residents of said town of Calais, by virtue of said license, had entered into said sand bank on the land now owned by said C. M. Gray and taken and removed sand from said sand bank, and in so doing

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have followed the veins of sand suitable for plastering, and left holes or excavations in said bank, and that said holes or excavations in no manner interfered with said highway. . . . He applied to the said C. M. Gray for license to enter on his land in the sand bank aforesaid, and take and carry sand from the same, suitable for plastering purposes, and the said C. M. Gray then and there granted license to this defendant to enter said sand bank on the land of said C. M. Gray aforesaid, and take and carry away sand for plastering purposes. And this defendant says that by virtue of the license aforesaid, and not otherwise, he entered into said bank on the land of said C. M. Gray, at the time and place mentioned in the plaintiff's declaration, and did take and carry away about fifteen bushels of sand from said sand bank, as he lawfully might, and that in making said excavation as aforesaid, he followed one of the veins of sand suitable for plastering purposes, and in so doing did excavate a small distance into said bank, leaving a small hole in said bank covered by sand and earth not suitable for plastering purposes, which said hole or excavation, so made as aforesaid, was more than twenty-five feet from the travelled part of the highway, and more than ten feet above the same. And this defendant says that said excavation in no way or manner interfered with said highway or rendered the same dangerous to travellers passing and repassing on said highway, or in any manner impeded travel on said highway.

Heath & Carleton, for the plaintiff.

This is an action on the case brought on the statute. G. S. c. 52, ss. 15, 16, 17; *Needham v. G. T. R. R. Co.*, 38 Vt. 294. The pleas are insufficient. The facts are not such as plaintiff is bound to traverse,—not issuable facts. *Aldrich v. Williams*, 12 Vt. 413; *Kidder v. Jennison*, 21 Vt. 108; *Jerome v. Smith*, 48 Vt. 230; 1 Chit. Pl. 616. The pleader should have denied, not by way of argument, that the excavation was in the highway. If the pleas amount to a bar they amount to the general issue. 3 M. & W. 244; Gould Pl. 352; *Burton v. Bostwick*, Brayt. 195. The declaration is sufficient. *Pierce v. Whitcomb*, 48 Vt. 127; *Jordin v. Crump*, 8 M & W. 782; *Barnes v. Wood*, 67 E. C. L. 398; 71 E. C. L. 326; 93 E. C. L. 556; 29 Conn. 548.

J. A. & G. W. Wing, for the defendant.

No cause of action is set forth. It is not alleged that the excavation was not on the defendant's own land; and if it was, he had a right to take the sand as he did. There is no statement showing any duty on the defendant to guard the hole as against the deceased, or, that he entered it by invitation of the defendant, or, that he had any business with the defendant, or, that the highway was

thereby rendered dangerous to travellers. It is not the case of opening a road to one's store or mill and thereby inviting the public to enter.

The first requisite in establishing negligence in defendant is to show the existence of the duty, which it is supposed has not been performed. Cooley Torts, 659. The defendant owed no duty to the deceased. One is not liable if he does not cover a pit on his farm to protect trespassers. Cooley Torts, 660; 29 Ohio, 364; 48 Vt. 127; 50 Barb. 358; 44 Pa. St. 378; 44 Ga. 251.

The opinion of the court was delivered by

ROYCE, Ch. J. The demurrer puts in issue the sufficiency of the declaration. If that is bad in substance, there is no occasion to examine the special causes of demurrer assigned to the pleas. The only substantial difference between the first count in this declaration and the one that has been adjudged bad, is in the addition of the averment that the deceased, while passing along and over said public highway without any knowledge that the same was unsafe and dangerous, did enter into said hole and excavation, he then having a lawful right so to do.

The hole and excavation referred to in that averment is previously described in the declaration as having been made by the defendant without right, by digging for sand in the bank within the limits of the highway. The negligence that is alleged is, in leaving said hole or excavation in such a condition that it was unsafe and dangerous for any person entering therein, by reason of the liability of the covering to said hole or excavation to fall in. It is alleged that the deceased did enter into said hole and excavation, he then having a lawful right so to do, and the sand and earth covering the same fell in upon him and killed him.

In an action of tort it is essential that the act complained of should be legally wrongful as regards the party complaining; it must prejudicially affect him in some legal right. The legal right of the deceased to the use of the highway as a traveller, was, that it should be reasonably safe for that use; and he had no right to complain of any act done within the limits of the highway that did not impair or interfere with that right. It will be observed that

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it is not alleged that the hole or excavation made by the defendant was within the travelled track, or so near to it that it rendered the highway unsafe ; or, that the deceased was forced into the hole or excavation from some necessity ; but from what is alleged it would appear that he entered it voluntarily. There is no allegation that the defendant by his conduct had invited the deceased to enter into the hole or excavation, or given him to understand that he was at liberty to do so. There is no allegation that the defendant owed any duty to the deceased to protect him against such accidents as might happen to him by reason of the hole or excavation being left in an unsafe and dangerous condition. The fact that the hole or excavation was within the limits of the highway does not vary the liability, unless by reason of its being within such limits it is shown to have operated to the injury of the legal rights of the deceased. If the hole or excavation had been made outside of the limits of the highway, it would hardly be claimed that upon such facts as are alleged in this declaration, a recovery could be had. It does not follow that because the deceased had the lawful right to enter into the hole or excavation, that the defendant was bound to protect him from injury while in it. The duty of the defendant was to protect the deceased from injury as far as the law required. The standard of duty to be observed by him did not embrace protection from such injury as is alleged in this declaration. There is nothing of substance in the second count to distinguish it from the first, that in any way affects the question of the sufficiency of the declaration.

The declaration is fatally defective and the judgment is affirmed.

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LEONARD DIX v. W. J. BATCHELDER AND TOWN OF
PLAINFIELD.

Constable, Town Liable for Neglect of. Prepayment of Constable's Fees. R. L. s. 851.

1. A constable duly empowered by vote of a town to serve process throughout the State is under the same obligations as a sheriff to legally serve a writ which he has received and agreed to serve, though the service is to be made beyond the limits of the town electing him; and, on failure to make such service, he and the town are liable in damages.
2. If an officer receives a writ without objection in regard to the prepayment of his fees, the presumption arises that the fees were either tendered or paid, or their prepayment waived.
3. The constable accepted the writ and agreed to serve it; but instead of that he gave it to a person, supposing him to be a deputy sheriff, but who, in fact, was not, which person, after pretending to make service returned it to the plaintiff's counsel, who entered it in court, but without knowledge of the defective service. This did not release the constable. There was no adoption of the act.
4. A question cannot be raised in the Supreme Court if it does not appear to have been made in the County Court.
5. R. L. s. 851, Acts of 1879, No. 32, and Gen. St. c. 15, s. 81—duty and liability of constables,—construed.
6. A statute, extending the jurisdiction, by implication, extended the duties and obligations, of constables.

CASE for neglect of the defendant, W. J. Batchelder, as constable of the town of Plainfield, in serving a writ in favor of the plaintiff against R. E. Peabody & Co. Jury Trial, September Term, 1881, REDFIELD, J., presiding. Verdict for plaintiff.

It appeared on trial that the plaintiff, residing in Washington County, procured a writ in his favor against R. E. Peabody & Co., a company doing business in Caledonia County, and having no property in Washington County, and no member of said firm resided in Washington County; that he sent the writ by his brother, Orville Dix, to defendant, Batchelder, to serve; that defendant B. gave it to one C. T. Batchelder, who, he supposed, was a deputy sheriff, to serve it; that said C. T. Batchelder pretended to make service on Peabody & Co.; that he then returned the writ to the plaintiff's counsel, with his name signed to the re.

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turn as deputy sheriff; that said counsel entered the same in court, and the plaintiff obtained judgment upon the writ; that an execution was issued and returned with an officer's return thereon of *nulla bona*; that defendant B. was constable and the defendant town had voted to give him the jurisdiction of the State in serving process; and that the said C. T. Batchelder was not a deputy sheriff.

The plaintiff claimed, and gave evidence tending to prove, that defendant B. accepted the writ and agreed to serve it; and that Peabody & Co. had sufficient property to secure his debt. The defendant claimed and gave evidence tending to prove that when the writ was brought to him he refused to serve it, and that no fees were tendered him for serving the same; that he informed the said Orville that he was unacquainted with serving writs, &c.; that thereupon the said Orville told him to hand the writ to said C. T. Batchelder to serve, and that he did so with instructions to secure the debt; and that both parties supposed he was a deputy sheriff. The defendant requested the court to charge the jury:

"1st. That the defendant, W. J. Batchelder, was under no legal obligation to serve the writ offered to him by Orville Dix, the agent of the plaintiff, in favor of the plaintiff against the firm of R. E. Peabody & Co., as neither of the members of said firm nor their property was within the county of Washington, and the defendants would not be liable for his refusing to serve the same.

"2d. That although it would have been the duty of the defendant Batchelder to have served said writ if the plaintiff had taken the proper steps, yet if the defendant Batchelder refused to serve the writ when it was offered to him, that the plaintiff would have to either pay or tender him reasonable fees for serving the same before the defendant Batchelder would be liable for not serving the same."

The counsel for the plaintiff argued to the jury in closing the case for the plaintiff, that the defendant Batchelder was under legal obligation to serve said writ, although the service had wholly to be made outside of the county of Washington, and the counsel for the defendant claimed that the court should instruct the jury as to the law upon that point as bearing upon the question as to whether the defendant in fact agreed to serve said writ as claimed by the plaintiff.

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The court instructed the jury that if Orville Dix delivered the writ in question to the defendant Batchelder, and said Batchelder agreed to serve the writ, and he afterwards delivered it to C. T. Batchelder to serve without the consent of the said Orville, then the defendants would be liable; otherwise the defendants would not be liable. The court refused to charge as requested aforesaid except to charge that defendant would not be liable unless he received the writ to serve and agreed to serve it.

J. A. & G. W. Wing and Heath & Carleton, for the plaintiff.

S. C. Shurtleff and O. L. Hoyt, for the defendants.

The opinion of the court was delivered by

VEAZEY, J. The only questions now insisted upon arise upon the defendants' requests and the charge of the court in respect thereto. It is claimed that a constable cannot be compelled to serve process beyond the limits of the town electing him, although his jurisdiction has been extended by vote throughout the State as provided it may be. Acts of 1879, No. 32; Revised Laws, s. 851. In another form, it is claimed that constables are not under the same obligations as sheriffs, to serve process except within the limits of the town electing them; and that a vote to extend their jurisdiction throughout the State only confers a right without imposing a duty; and that as the defendants in the writ, which it is here charged the defendant Batchelder as constable without cause neglected to serve, resided in another county and had no property to be attached in the county where the constable resided and where the writ was returnable, he was under no legal obligation to serve it; and that therefore if he undertook to serve it his town is not responsible for his neglect, its liability arising in such case only where the constable refuses to perform some duty imposed by law. It is also claimed that the Revised Laws changed the substance as well as the language of the statutes as to the obligation of constables to serve process. This was not intended, as the report of the revisers shows. But as the defendants' argument is based on the

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language of the General Statutes, which were in force when this case arose, we should refer to the provisions therein. By express provision sheriffs were obliged to receive and serve writs, &c. Gen. Sts. c. 15, s. 81. As to constables the provision was as follows:

“ Each constable, within the town for which he is elected, may serve any writ or precept, issuing from any court or authority in this State, except writs to which he is a party. * * * And shall have the same powers, *within such town*, and be under the same liabilities, and subject to the same penalties, as sheriffs in their respective counties.” Gen. Sts. c. 15, s. 79.

Section 81 of the same chapter provided for an extension of jurisdiction, and this was amended in 1879. Act No. 32 was to give them jurisdiction as to all processes, civil or criminal, throughout the State, returnable within the county where the constable resided, provided the town electing him so voted. This vote was taken as to the defendant Batchelder.

It is insisted that the words in the statute, “*within such town*,” italicised above only for convenience of reference here, are words of limitation as to the powers and obligations of constables, restricting their exercise within the town. We think they are but repetition of the same words in the first line of the statute, and may be dropped out as they were in the Revised Laws without altering the sense.

That section only purports to confer jurisdiction within the town, and in specifying that the power and obligations and penalties of a constable should be those of sheriffs, in the service of process, it could have reference only to the extent of his jurisdiction. But when afterwards the jurisdiction was extended without further provision as to powers and obligations, they were impliedly extended with the jurisdiction. It is not contended that constables were not under the same obligations as sheriffs to serve process within the town. The contention is that the effect of the extension of jurisdiction of a constable was to create a right to serve process anywhere within the State, but not to create an obligation in that respect. We fail to find this distinction anywhere suggested in the reported cases. Under the rule estab-

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lished in this State that an officer cannot excuse himself from the service of process because it is erroneous, but is bound to execute it unless absolutely void, the court has always made the application to constables indifferently with sheriffs, and nowhere is a distinction alluded to. *Stoddard v. Tarbell*, 20 Vt. 321; *Isham v. Eggleston*, 2 Vt. 270; *Chase v. Plymouth*, 20 Vt. 469. The statutory form of the address of processes is, "To any sheriff or constable," &c. We think the intent and effect of the statute in conferring the *same powers* under the *same liabilities*, and subject to the *same penalties*, as in case of sheriffs, was to put constables on the same footing with sheriffs as to their obligation to receive and serve any process which they have the right to serve; and that this is according to the professional understanding and general practice since the statute was passed nearly a hundred years ago. The phraseology of the early statutes and the history of the legislation in respect to constables, sustain this view. See marginal references to the statutes in section 851 of the Revised Laws. The defendants were therefore not entitled to have their first request complied with. The court did comply with the second request, and went further even than the request called for.

In *Carlisle v. Soule*, 44 Vt. 265, it was held that if an officer receives a writ without objection in regard to the prepayment of his fees, he thereby waives such prepayment, and is bound to serve the writ the same as though the fees had been prepaid; and that a presumption arises from an acceptance of the writ that the fees were either tendered or paid, or their prepayment waived. In this case the court instructed the jury that the defendants would not be liable unless Batchelder received the writ to serve *and agreed to serve it*. If he received the writ to serve without objection and could have served it, the fact that he turned it over to another person to serve would not relieve him from liability to the creditor for damage accruing from negligence in the service or return of it. *Isham v. Eggleston*, 2 Vt. 270.

The defendants further claim that the plaintiff and his counsel having accepted the writ from the person who served it and entered it in court, thereby adopted what had been done, and that

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this would release the constable to whom the writ was delivered by the plaintiff.

It does not appear that this question was made in the County Court, therefore it cannot be raised here. But if properly before this court, there is nothing in the bill of exceptions to show that the plaintiff or his counsel acted with knowledge of the defect in the service, which appears to have consisted of the fact that the person who served the writ as a deputy sheriff was not such officer. On the other hand it would seem that they supposed he was a duly commissioned officer. It is immaterial whether a writ is served by the officer to whom it was delivered or by another officer, provided there is due service. And where the service of the writ is performed by any one, duly authorized, in the manner required by law and without prejudice to the creditor, he has no claim against the officer to whom it was delivered.

Isam v. Eggleston, supra.

The other points of exception are not now urged.

Judgment affirmed.

RUTLAND COUNTY,

JANUARY TERM, 1883.

[CONTINUED FROM PAGE 1, *ante.*]

SETH PHILLIPS v. FRANKLIN POST AND J. B. REYNOLDS.

Ejectment. Deposition. Costs.

1. The plaintiff granted to the defendants, R. and P., the right for fifty years to dig and remove all ores and minerals found on his farm, and was to receive an annual rent and a royalty. Within one year R. conveyed his interest to P. The plaintiff had continuous possession. R. did not claim title or possession. P. was defaulted; R. disclaimed. *Held*, that ejectment would not lie, and that R. was entitled to his costs.
2. *Deposition,—costs.* The citation was served on the plaintiff at Rutland on the 4th, to appear at New York City on the 8th, to be present at the taking of a deposition to be used in the County Court, which was to commence on the 12th, all of the same month. The deposition was taken by another notary than the one named in the citation. Costs not allowed.
3. R. L. s. 1249, ejectment, disclaimer, construed.

EJECTMENT. Defendant Post was defaulted. Defendant Reynolds pleaded the general issue and notice. Trial by court, September Term, 1882, VEAZEY, J., presiding. Judgment for the plaintiff to recover possession, and \$51.50 damages for detention. The facts are sufficiently stated in the opinion and head notes.

W. C. Dunton and *Edward Dana*, for the plaintiff.

W. H. Smith, for the defendants.

The opinion of the court was delivered by

REDFIELD, J. The action is ejectment. The plaintiff executed to the defendants a contract in the form of a lease, which was duly recorded in the town clerk's office as a deed, therein granting

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for a stipulated annual rent and a specific royalty reserved, a right to prospect for, and dig and remove from the described premises, all ores and minerals that might be found on the same. Within one year from the date of the contract Reynolds conveyed all his interest in the lease to the defendant Post. Post is defaulted and Reynolds disclaims and seeks judgment for his costs. The case finds that Reynolds had never been on to said premises, or claimed title or possession of the same. The plaintiff has been in the continuous use and possession of the same without interruption by the defendants.

The office of ejectment at common law is to enable the owner to regain the possession of lands from which he has been wrongfully ousted. This case is wanting in many of the essential requisites of such actions unless aided by the provisions of our statutes. The statute, R. L. s. 1249, provides that "in the action of ejectment, if a defendant disclaims as to the whole, he shall recover his costs unless the plaintiff proves such defendant in possession of the whole or a part of the premises demanded, at the commencement of the action." This defendant was not in possession, nor did he claim possession but disclaimed it, and had conveyed away all claim or title in the premises demanded many years before. To what extent the defendant might be liable on the contract for the stipulated *annuity* in a proper action, we are not required to determine. We think this action cannot be maintained against Reynolds upon the facts found in this case.

The judgment of the County Court is reversed, and judgment for Reynolds to recover his costs. The expense of Post's deposition will not be taxed on defendants' bill of costs.

GENERAL TERM,

OCTOBER, 1882.

[CONTINUED FROM PAGE 84, *ante.*]

ST. JOHNSBURY & LAKE CHAMPLAIN R. R. COMPANY v.
B. A. HUNT.

*Master. Servant. Interfering with Servant. Proximate and
Remote Damages.*

An action may be sustained by a master against one maliciously causing the arrest of his servant, when no legal cause of action existed against the servant, and the arrest was for the sole purpose of injuring the master; and, maliciously causing the arrest of a railroad company's engineer while running a train of cars, to delay the train and thereby damage the company, is actionable. And, held on demurrer, that it was not necessary to aver what became of the defendant's suit against the servant, if the pleadings admit that it was malicious, false, and hopeless.

ACTION by railroad company against one for maliciously causing the arrest of its engineer. Heard on demurrer to the declaration, June Term, 1882, Caledonia County, Ross, J., presiding. Demurrer *pro forma* sustained. The declaration averred, in part:

"That the said defendant on said 2d day of November, A. D. 1881, was the owner of a certain one year old heifer and certain other cattle; that on said 2d day of November, A. D. 1881, the said defendant, at Johnson aforesaid, wrongfully, carelessly and negligently permitted said heifer and other cattle to be and remain on a public highway, in said town of Johnson, which crosses the plaintiff's railroad, and wrongfully permitted said heifer and other cattle to wander from said highway on to said plaintiff's railroad in said Johnson, and wrongfully to remain thereon; and the plaintiff says that while said heifer was thus wrongfully upon said railroad the said heifer was struck by the plaintiff's said engine and train thus skilfully, carefully and prudently run as aforesaid, and was slightly injured thereby, to wit, at Johnson, on said 2d day of November; and the plaintiff says that one ——— Collins was the plaintiff's engineer running the said plaintiff's engine and train as aforesaid; that the said Collins managed said engine and train with skill, care and prudence at the

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time said engine struck said heifer ; that said defendant's said heifer was not struck or injured by any wrongful act or neglect of the said Collins as such engineer ; that the said defendant had no just or legal cause of action against the said Collins by reason of said heifer's being struck by said engine as aforesaid ; that said injury arose from the wilful act and neglect of said defendant permitting said heifer to be wrongfully on said railroad ; and the defendant well knew that he had no just or legal cause of action against the said Collins ; yet the said defendant, not regarding the rights of the plaintiff, for the sole purpose of injuring the plaintiff in this behalf and of delaying and hindering the plaintiff in the operation of its said road aforesaid in the running of its trains, at Johnson aforesaid, on the 7th day of November, A. D. 1881, sued out a writ of attachment against the goods, chattels and estate of the said Collins and capias against the body of the said Collins, . . . and dated the 7th day of November, A. D. 1881, and directed to any sheriff or constable in the State to serve and return, commanding such officer to attach the goods, chattels or estate of the said Collins, and for want thereof to take his body, &c. ; . . . and the plaintiff says that the said defendant, well knowing that the said Collins was an engineer of the plaintiff and then engaged in running one of the plaintiff's engines and trains upon said railroad, and that the arrest and detention of the said Collins would delay the plaintiff's said engineer and train and greatly damage the plaintiff, on the 7th day of November, A. D. 1881, at Johnson aforesaid, placed said writ in the hands of a deputy sheriff of said County of Lamotte, and wrongfully, with the sole purpose of harrassing the plaintiff and delaying it in the operation of its said road and in the running of its trains, caused said deputy sheriff by virtue of said writ to stop the plaintiff's train, on which said Collins was then and there engineer, at an undue and improper hour, to wit, at the hour of three o'clock in the morning, and to arrest the body of said Collins while so running said engine and train of the said plaintiff, and to imprison the body of the said Collins for a long space of time, to wit, for the space of one hour, and thereby to deprive the plaintiff of its said engineer, and to delay and impede its said train for the same space of time."

Belden & Ide, for the plaintiff.

This is not a case of the doing of a *lawful* act from a malicious motive, because the act was *unlawful* ; unlawful in this,—arresting Collins from an honest motive would be lawful ; but arresting him from malicious motives, knowing that no cause of action existed, was unlawful. A prosecution, in arrest, an excessive attachment, &c., malicious and without probable cause, are all unlawful. 1 Willard Torts, 414, 423, 435. Both the master and servant had a cause of action against the defendant. The damages are not too remote. 1 Sedgw. Dam. 66, 88 ; 13 Tex. 324 ; *Derry v. Fletner*, 118 Mass. 131. Delay of the plaintiff's train was the direct, proximate, immediate, and necessary result of the defendant's act,—the arrest of the engineer. The whole proceed-

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ing was aimed at the plaintiff; and it struck just where it was aimed. *McAfee v. Crofford*, 13 How. 447; *Gunler v. Astor*, 16 E. C. L. 357; 19 Johns. 381; *Vannerburgh v. Truax*, 4 Denio, 464; *Burrows v. Coke*, L. R. 5 Ex. 67; *Scott v. Kenton*, 81 Ill. 96; *Tarleton v. McGawley*, Peake, 205; *Ashley v. Harrison*, Ib. 194; *McCarthy v. Guild*, 12 Met. 291; *Haywood v. Collinge*, 9 Ad. & E. 268; *Page v. Cushing*, 38 Me. 527. If I should descend into a deep well to repair or cleanse it, leaving only my servant at the top to draw me up, can the defendant take advantage of my situation, arrest and carry off my servant on a known false and malicious writ for the sole purpose of depriving me of his service, and leave me to die at the bottom of the well, with no liability to me for the wrong thus purposed and consummated? He can, if the theory of the defence in this case is correct. See *Griffin v. Farwell*, 20 Vt. 151.

P. K. Gleed, for the defendant.

It is true, perhaps, that the novelty of this case is not conclusive against it. The question is: Has the plaintiff been injured in a *legal* right? Was the act of arresting Collins illegal as to this plaintiff? It may or may not be legal *as to Collins*. That is not the question. What is the fair scope of the words, "caused the said deputy sheriff by virtue of said writ to stop the plaintiff's train"? This cannot mean a physical interference with the train, —throwing the writ across the track, and commanding it to stop, or by other force. The words mean that the sheriff caused the train men to stop the train so that he could arrest Collins. The gravamen of the count is the arrest of Collins; and the question remains, was it an infringement of the plaintiff's rights? The pleader gains nothing by stating the motive, if the act was legal. *So. Royalton Bank v. Suffolk Bank*, 27 Vt. 505; *Chatfield v. Wilson*, 28 Vt. 49; 11 Vt. 22. There is no averment of malice, or want of probable cause, against Collins. The damage as to the plaintiff was *damnum absque injuria*. The railroad company cannot raise the question of the illegal arrest of Collins. He alone can sue for malicious prosecution,—and that only after judgment in his favor on the writ on which he was arrested. 44 Vt.

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124 ; 42 Vt 276 ; 1 Am. Lead. Cas. 751. Inconvenience resulting from legal action is damage without injury. Reeves Dom. Rel. 536. At common law the killing of a person upon whom another person depended for support was not actionable ; much less the legal arrest of a railroad's engineer. 1 Smith Lead. Cas. 445. No right of the plaintiff has been infringed upon. The damage is too remote. 1 Smith Lead. Cas. 450 ; *Barker v. Willard*, 18 C. B. 58 ; 11 Ired, 291 ; 2 Addison Torts, 6. That a judgment against Collins in the first suit would be a bar ; see 25 Vt. 635 ; 39 Vt. 326 ; Bigelow Estop. 61 ; it should, therefore, have been alleged that that suit terminated, and in his favor.

The opinion of the court was delivered by

VEAZEY, J. The case stands on demurrer to the first count of the declaration. The defendant's counsel contends that the "gravamen of the count is the arrest of Collins," and that his arrest was no infringement of the rights of the plaintiff ; that this was illegal, if at all, only as against him, and that the plaintiff cannot recover damages for an act not illegal as to itself ; that the damages resulting to the plaintiff from this arrest of its servant upon due process are *damnum absque injuria*.

We think the assumption that the gist of the count is the arrest of Collins is unsound. The gist is the delay of the train for the purpose of injury to the plaintiff. To accomplish the injury the defendant resorted to the contrivance of a legal proceeding against the servant. The process was correct in form, and was a legal warrant for the act of the officer. But, back of that, the act of resorting to legal proceedings against Collins was, under the averment, wrongful, and this wrongful act was adopted as a means and for the purpose of injuring the plaintiff. The preliminary or concurrent wrong to Collins did not alter the character of the wrong to this plaintiff. The wrong to Collins was the instrumentality adopted to accomplish this injury. A suit for malicious prosecution by Collins would not be affected by the fact that the officer was warranted in serving the original process, or that his act of arresting was legal as to him, but it would reach back to the question of motive and probability of cause. No more should

the intervening act of the officer affect the plaintiff's remedy here. The same injury to the plaintiff might have been accomplished by placing an obstruction upon the track. Probably if the defendant had had a lawful claim against Collins, and the enforcement of it by legal process had produced the same injury to the plaintiff company, it would have been remediless even if the real motive of the process had been such injury; because it is immaterial with what motive a person does a legal act. But this suit is not brought by the plaintiff for interference with its servant and to recover damages resulting from loss of his services; it is brought for stopping and delaying the train to the plaintiff's injury. The declaration sets up the unwarrantable interference with the servant simply as a method by which the designed result was accomplished.

It is further contended in behalf of the defendant that Collins being the injured party has his action for the injury done, and that the defendant ought not to be subjected to two actions for the same act.

It is admitted under the demurrer that this plaintiff was injured by the act of the defendant which we hold was wrongful. It is no answer to a claim for this injury to say that this act also injured another party. Each party suffering directly from a wrongful act is entitled to a remedy against the wrong doer. A single act of trespass destroying one man's arm and another man's leg would create a right of action in each separately. Further suggestion is made that the declaration contains no averment that the suit against Collins has terminated in his favor, and that the same rule should apply here as though this were his suit for malicious prosecution. This suggestion is made upon the assumption that the declaration shows a privity between Collins and the railroad company in respect to the subject-matter of the suit against Collins. Treating the assumption as correctly made, how does the case stand? The declaration states in substance that the suit against Collins was utterly groundless and hopeless. The demurrer admits this. The rule that the plaintiff in an action purely for malicious prosecution should allege and prove that the original proceeding has terminated in his favor, rests on the ground that the court will not tolerate inconsistent judgments upon the same

question between substantially the same parties. But there is a class of actions for malicious prosecution where it has been held that an admission that the alleged malicious suit could not be maintained, obviated the necessity of proving it had terminated. *Wills v. Noyes*, 12 Pick. 326 ; *Page v. Cushing*, 38 Me. 527. In the latter case it was held that the admission may be by plea or by parol. The court there say : " The bare possibility of inconsistent verdicts should not exempt or relieve a party from responsibility for admitted wrong." This declaration does not state what became of the other suit. The demurrer admits it was malicious, false, and hopeless. Any presumption of probable cause, or that Hunt was in the pursuit of a legal right against Collins, is overcome by the admission. The technical averment which this declaration lacks is supplied by averments admitted to be true, showing that the result must follow or must have occurred which the omitted averment would have alleged had occurred. But if this answer to the above suggestion is unsound, upon what ground would this plaintiff be estopped by a judgment against the defendant in the former suit, so far as anything is disclosed in this declaration ? It was not a party thereto, nor was it vouched in to defend. It neither assumed, nor had the opportunity, to control the defence. It was not in a situation to prevent a judgment against the defendant therein by collusion, by default, by ignorance, or by concession or compromise. Judgments are conclusive only upon parties and those claiming under them. This rule, upon the ground that a principal and servant are substantially one in interest, might well be expanded so as to admit it in a suit against a servant when the same question has been decided and judgment rendered for the defendant in a suit against the master for the alleged trespass of the servant for which the master is responsible, as illustrated in the case of *Emery v. Fowler*, 39 Me. 326 ; but such is not this case. The general rule is that the master is responsible for the acts of the servant ; but there are several exceptions. Dunlap's Paley on Agency, 298. There may also be wrongs committed by the servant for which the master only is responsible. 2 Hil. on Torts, 554. The relative status of this plaintiff and its engineer as to the wrong charged upon the latter cannot be cer-

tainly determined from this declaration ; but treating it as a trespass for which this plaintiff was responsible, then they could have been sued together or separately ; and they could have defended each independently of the other. Judgment unsatisfied against either separately would be no bar to another suit against the other. This point was settled early in this State in the case of *Sanderson v. Caldwell*, 2 Aik. 195 ; where the authorities are cited and fully discussed by Judge PRENTISS. In the later case of *Andrus v. Howard*, 86 Vt. 248, the further question, somewhat controverted elsewhere, was here settled that the master is liable in *trespass* for an act of his servant, which is a trespass, though it occur through the neglect or unskillfulness of the servant. As joint trespassers, independent of the relation of master and servant, it is plain the former judgment for the plaintiff, if there was one, would not conclude this plaintiff. With this relation existing if the judgment was there for the defendant, it is equally plain that it would not have concluded the plaintiff therein from another action against this plaintiff if the former action failed on the ground that the wrong which the former plaintiff suffered, though committed by the servant, was one for which this plaintiff only, if anybody, was liable. " No person can bind another by any adjudication, who was not himself exposed to the peril of being bound in like manner, had the judgment resulted the other way : " Freeman on Judgments, s. 154 ; or as expressed by SPENCER, J., in *Case v. Reeve*, 14 John. 88 : " No person can derive benefit from a verdict who would not have been prejudiced by it, had it gone contrary." If, therefore, a state of facts might be disclosed which would preclude the application of the maxim, *res inter alios acta*, &c., which is doubtful, this declaration fails to disclose them. The reason of the maxim as expressed by Wharton, 184, is, that it would be unjust to bind a person by proceedings taken behind his back, to which he was, in fact, no party, and to which he had not an opportunity of making a defence, and from which he could not appeal. *Nason v. Blaisdell*, 12 Vt. 171. We think no privity is disclosed in this declaration between the railroad company and its engineer, in respect to the point involved in the other action. It is further insisted that the action cannot be maintained because

the damages are inconsequential and too remote. We think the injury and damages were direct. They were not only such as could reasonably have been contemplated at the time, which is one of the tests laid down in Sedgwick on Damages, vol. 1, marg. p. 66-7, but they were the damages actually contemplated. In *Derry v. Flitner*, 118 Mass. 131, the court say: "A wrong doer is liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act." Sedgwick, 88, says the disposition of courts is to include in the injurious consequence, flowing from the illegal act, those that are "very remote." No extreme view is required here. It cannot be said that the stoppage and delay of the plaintiff's train was a remote result of the defendant's act. It was the probable, if not necessary, result. And it was in fact the direct, proximate, immediate and contemplated result. Familiar cases often cited as showing what damages are not too remote to be included in the recovery, are *McAfee v. Crofford*, 13 How. (U. S.) 447; *Gunter v. Astor*, 4 J. B. Moore, 12 (16 Eng. Com. Law, 357); *Gribb v. Swan*, 19 J. R. 381; *Vanderburg v. Truax*, 4 Denio, 464; *Burrows v. Coke & Gas Co.*, L. R. 5 Ex. 67; *Scott v. Kenton*, 81 Ill. 96; *Tarleton v. McGawley*, Peake, 205. In the latter case it was held by Lord KENYON, at *Nisi Prius*, that an action lay for firing on negroes on the coast of Africa, and thereby deterring them from trading with the plaintiff, so that the plaintiff lost their trade. There the trespass was directly against the negroes, but the wrong intended and the injury actually done was to the plaintiff.

The defendant cites the case of *Ashley v. Harrison*, Peake, 194, where the proprietors of a theatre brought an action against the defendant for having written a libel upon one of the plaintiff's singers, by which she was deterred from appearing, whereby his profits were lost. Lord KENYON held that the damages were too remote; but this was on the ground that the damages arose from the vain fears or caprice of the actress. She could have sung but would not. Her fears or caprice intervened between the wrong-

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ful act and the alleged result. To make the case parallel to this she should have been driven from the stage while performing her part by unlawful interference of the defendant, for the purpose of injury to the plaintiff. See *Hughes v. McDonough*, 14 Vroom's, (N. J. Law) Reports; also published in Albany Law Journal, May 27, 1882, p. 410.

The *pro forma* decision of the County Court is overruled, and the first count is adjudged sufficient, and the cause is remanded with leave to the defendant to plead, upon the usual terms.

M. C. CANERDY, ADMR., v. ANNETTE O. BAKER.

Rehearing. Chancery. Apparent Error. Review.

1. A chancellor may rehear a cause remanded from the Supreme Court on petition for substantial errors apparent or manifest from the papers and pleadings, errors plainly resulting from inadvertence or oversight of an uncontroverted or settled fact, errors or mistakes such as it is evident the Supreme Court would correct upon suggestion before the cause was remanded.
2. But in a cause remanded this remedy is in no sense applicable for the purpose of review.
3. Under the twenty-fourth rule in chancery an application for rehearing must be made and notice of it served upon the adverse party within twenty days from the rising of the court which pronounced the decree, (in this case the Supreme Court).
4. The petition was dismissed on the ground that the error alleged was not an error; that nothing had been overlooked in the first decision.

PETITION for rehearing. Heard March Term, 1881. REDFIELD, Chancellor, dismissed the petition. The original cause was heard at the General Term, 1880. This petition was signed by the petitioner, February 8, 1881, and the citation to the peti-

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tion was signed by the Chancellor, February 10, 1881. In view of the decision of the court, the many questions raised by the pleadings are not important.

P. Dillingham & Son and *E. F. Palmer*, for the petitioner, cited on the question that a petition for a rehearing was the proper remedy, if there was apparent error, Story Eq. Pl. ss. 404, 421; Mitford Pl. (6th Ed.) 108; Cooper Pl. 98; 2 Maddock Ch. Pl. 484; 2 Dan. Ch. Pl. & Pr. (5th Ed.) 1577; *Perry v. Phillips*, 17 Ves. 478; 3 Vt. 151; 6 Vt. 179; *Slason v. Cannon*, 19 Vt. 221; 17 Wall. 417; 1 Tenn. Ch. 148, 452; 31 N. Y. Ch. 592, n.

J. A. Wing and *C. F. Clough*, for the defendant.

No appeal from the decision of the chancellor dismissing the petition. 1 Paige 256; 3 Eq. Dig. 432, 435; 2 Dan. Ch. Pl. & Pr. 1554; Adams Eq. 396; 18 How. 42; 6 Johns. Ch. 255. A chancellor cannot rehear a cause that has been heard in the Supreme Court. 2 Dan. Ch. Pl. & Pr. 1556; Story Eq. Pl. 335; 14 How. 25; 9 Wall. 604; Chit. Dig. 1843. The original cause was heard in November, 1880; the petition was served February 11, 1881; it was, therefore, too late by the rule. *French v. Chittenden*, 10 Vt. 127.

The opinion of the court was delivered by

VEAZEY, J. This is a petition for rehearing before a chancellor of a cause heard, determined and remanded by the Supreme Court, and now stands on appeal from the order of the chancellor dismissing the petition. The case presents an important question of practice, viz: whether such petition may be properly brought to the Court of Chancery after decision by the appellate court, for alleged error of that court.

In this State we look mainly to the English Chancery for authority on questions of chancery practice, wherein the same are not regulated by our statutes or rules of court. Neither the statutes or rules specifically provide for a rehearing of a cause other than by appeal or review, but both recognize this as a form of

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remedy and make some provisions in respect to it. Rule 24 provides that the rehearing shall not be considered a matter of course in any case; and it has often been elsewhere held to rest in the discretion of the court, and that it is not a matter of right. *Daniel v. Mitchell*, 1 Story C. C. 198; *Dexter v. Arnold*, 5 Mason, 808; 2 Daniel Ch. Pl. & Pr. 1554. In the English Chancery, when a party felt himself aggrieved by a decree or order, there were three modes, according to Daniel Vol. 2, Ch. 31, by which he might have it reversed or altered, viz:—1. By a rehearing before the same or another judge of the court; 2. By appeal to the House of Lords; and 3. By a bill of review. Gray in his work entitled, "The Country Solicitor's Practice in the Court of Chancery," 204, makes a division into five modes of proceeding, but covering the same ground. These authors and others lay down the remedy by rehearing as distinct and definite; although many of the rules pertaining to this proceeding are the same as in case of appeal or bill of review. In addition to the appeal to the House of Lords, there could first be an appeal from the Master of the Rolls or the Vice Chancellor to the Chancellor, but this, though not called a rehearing was in principle that, it being a hearing by another judge of the same court upon the same facts as were in the record at the first hearing, whether they were all there used or not. The appeal to the Lords differed from a rehearing in that it was heard by another court. The House of Lords was the appellate court of the Court of Chancery, as our Supreme Court is the appellate court of the Court of Chancery. A bill of review was resorted to, not only where the error was apparent on the face of the decree, but when new facts were discovered after the decree or too late for use when the decree was made. If discovered before enrollment of the decree, a supplemental bill in the nature of a bill of review applied; if after enrollment, a bill of review was the proper remedy. The proper office or function of a proceeding denominated a rehearing was to correct apparent error; as where some plain omission or mistake has been made, or where something material to the decree is brought to the notice of the court which had been before overlooked. *Jenkins v. Eldridge*, 3 Story C. C. 299. Although a

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petition for rehearing is in certain sense an application for re-argument, yet it would not be tolerated simply to obtain a reargument and reversal of a cause once heard and decided by the Supreme Court, because it is well settled that even that court will not revise a former decision made by it in the same cause upon substantially the same state of facts. *Stacy v. R. R. Co.*, 32 Vt. 551. As an appellate court of the Court of Chancery it makes such orders "as justice requires," and remands the cause to the Court of Chancery, where such proceedings may be had as are necessary to carry its orders into effect. Sec. 774, R. L. It does not make the final decree, but issues a mandate to the Court of Chancery in respect to it. It is not denominated a Court of Chancery, but is an appellate court from the final decrees, and those only, of the Court of Chancery. *Slason v. Cannon*, 19 Vt. 219. In the English Chancery there was no *positive* restriction in regard to the number of rehearings allowable before the appeal; but as a general, though not inflexible, rule, a second rehearing was not permitted after a cause had been heard before the appellate tribunal, without leave of that tribunal upon a special application for that purpose. 2 Daniel, ch. 31, 1554-5, Am. Ed. and cases cited in notes. There was evident propriety in this rule; because where it appeared there was apparent error upon the face of the decree the aggrieved party had a remedy, after enrollment of the decree, by a bill of review. But our statute has limited bills of review, in cases which have been determined by the Supreme Court on appeal, to causes which originated after, or were unknown to the party before, the determination of the Court of Chancery from which the appeal was taken. Sec. 777, R. L. Probably the Supreme Court would hear a motion to correct apparent error, if made at the term and before the cause was remanded; but this ordinarily would not be a very practicable remedy; because decisions are not rendered until the end of the term, or in vacation as of the term.

In view of this and of the fact that a bill of review is not generally available, under the restrictions of our statute, to correct errors appropriate for correction upon rehearing, we think it would be more consonant to the liberal spirit pervading the practice in the English

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Chancery to guard against apparent error, to hold that a chancellor might rehear a cause remanded from the appellate court, when based upon proper grounds and seasonably filed and certified as our rules require. The "proper grounds" have already been somewhat indicated. They should be limited to substantial errors apparent or manifest from the papers and pleadings, errors plainly resulting from inadvertence, or oversight of an uncontroverted or settled fact, errors or mistakes such as it is evident the Supreme Court would correct upon suggestion before the cause was remanded. In a cause remanded this remedy is in no sense applicable for the purpose of review. Every consideration demands that a *decision* of the Supreme Court should be final, and especially that it should not be changed by a single judge as chancellor. But error, inadvertence, mistakes happening in the manner above indicated, is not "decision." Beyond the above limitation we think a chancellor has no right to rehear a cause remanded. Within that limitation he may in his discretion grant a rehearing. In *French v. Chittenden*, 10 Vt. 127, it was held under the then, seventeenth, now the twenty-fourth, rule in chancery, that an application for rehearing must be made and notice of it served upon the adverse party within twenty days from the rising of the court which pronounced the decree. Under this authority this application was not seasonably filed. But a more satisfactory ground for dismissing the petition is, that the alleged error in the former decision was not an error. The ground now urged for a reversal was then considered, and the decision as announced was deliberately made and nothing now suggested was then overlooked.

The order of dismissal affirmed.

Swan v. Swan.

GEORGE L. SWAN v. WILLIAM SWAN AND HARRIET W. SWAN.**[IN CHANCERY.]***Mortgage. Divorce. Alimony. Subrogation. Ante-Nuptial Contract.*

After two mortgages had been placed on his farm the mortgagor's wife obtained a divorce, and \$1750, having been decreed her as alimony, was made a further lien on the farm. These three liens or charges remaining, the parties after some two years were re-married, first entering into an ante-nuptial agreement by which she was to receive a deed of one-half of the farm, and when he had paid the mortgages the claim for alimony was to be discharged. The deed was executed, but the mortgages were unpaid. They continued to live on the farm for about three years, when he conveyed away his interest, and abandoned her. The owner of the mortgages took possession of the premises and occupied for several years, taking the rents and profits amounting to \$200 per year. A bill being brought to foreclose the mortgages. *Held,*

1. If the husband paid the mortgages the deduction for rents should be at the rate of \$100 per year; but if the wife paid, it should be \$200 per year; that is, the use of her half could not be appropriated to pay his debts.
2. If she is compelled to pay the mortgages she should be subrogated to the rights of the petitioner.
3. When the mortgages are paid her deed will operate a satisfaction of her decree for alimony.

BILL of foreclosure. Heard December Term, 1881, on a master's report. **POWERS**, Chancellor, decreed :

The petitioner may have a decree of foreclosure upon the Spencer Smith and Wallace W. Swan mortgages, described in the petition against both defendants, for the amounts reported, with accruing interest, and deducting future accruing rents and profits at the rate of \$200 per year. As to defendant William, the day of redemption is limited to Jan. 1, 1883; and as to defendant Harriet, the day of redemption is extended to Feb. 1, 1883, and in case she is compelled to redeem she shall be subrogated to the rights of the petitioner against said William under this decree, and may enforce the same against said William's half of said farm.

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The ante-nuptial contract was, in part :

" This certifies that William Swan has this day deeded to me one undivided half of his farm, . . . (naming said two mortgages) and I have a claim on aforesaid farm for the sum of \$1750, it being a decree for alimony and a charge and lien on aforesaid farm ; . . . and I hereby promise and agree that when the aforesaid mortgages are fully paid and released from said farm, that I will release and fully discharge the said Swan from all liabilities in consequence of said decree."

The master found, in part :

" In relation to this the master finds that when the said William and Harriet made and executed the papers last aforesaid, it was mutually expected and intended that the two mortgages on said farm should be paid by the undivided avails of said farm ; and that each of them there expected to live together and work together on said farm for the purpose of paying said mortgages, expecting when said mortgages were paid that each would own an undivided half of said farm. In relation to this the master finds that said expectation and intention on the part of the said Harriet was based on the consideration that they were to live and work together, and that when the said William sold and conveyed to King and left the State, as aforesaid, the said Harriet was released from any obligation to assist in paying said mortgages if any such obligation ever existed."

The other facts are stated in the opinion of the court and in the head notes.

S. B. Hebard and *A. S. Austin*, for the orator.

Lamb & Tarbell and *D. C. Denison & Son*, for the defendant William Swan.

The opinion of the court was delivered by

VEAZEY, J. The decree of the chancellor was correct except in case of redemption by the defendant William, it would compel the defendant Harriet, or her interest in the farm, to pay a part of his debt. The renewal of the trouble between these defendants, who are husband and wife, resulting in a second separation, prevented the mortgage debts being paid as was contemplated at the time of the ante-nuptial contract. These mortgages belonged to the husband to pay. The intention was that the conveyance of half the farm to Harriet should settle and remove her lien thereon

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under her decree for alimony, but this lien was to continue until the mortgages were paid. Harriet has received only a small portion of her alimony, and still holds the title to one-half the farm. The orator holds both mortgages and has been in possession under them, taking the rents and profits since the spring of 1877, amounting to \$200 per year. This bill is brought to foreclose, and the question is whether the whole or one-half of the rents and profits shall be applied on the mortgage debt; or stated in another form, whether the rents and profits of the wife's half of the farm shall be applied. We think it should not, if the husband redeems. It was not her debt to pay. As against the husband, the deduction of rents and profits should be at the rate of \$100 per year, instead of \$200, as provided in the decree. If he does not redeem, then the deduction, for the purpose of fixing the amount of the decree as against the wife, should be at the rate of \$200 per year, as stated in the decree. The decree was correct in providing that if she was compelled to redeem she should be subrogated to the rights of the petitioner against William, and may enforce the same against his half of the farm. When the mortgages are paid, her deed will operate a satisfaction of her decree for alimony. That was the intention of the parties and the fair import of the ante-nuptial contract.

Decree reversed and cause remanded with mandate.

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ISAAC K. DREW v. TOWN OF SUTTON.

Highway. Evidence.

1. Whether a highway is sufficient or not is a question of fact for the jury; and there was no error in that the court refused to direct a verdict for the defendant, although the plaintiff's evidence showed that the defect was *six inches outside of the highway*, being a steep embankment twenty-two feet high, without railing or muniment; that the highway was three rods wide, and the wrought or travelled part thirty-eight feet, level up to the brink; that the injury occurred in the night, and in consequence of the darkness the plaintiff was unable to see the surroundings, and drove off the brink.
2. To render the town liable it is not necessary that the defect be *in the way*, if it is in such close proximity as to render travelling along the way dangerous.
3. A physician was allowed to testify that he called on the plaintiff sometime after the injury, not professionally, but to transact business and that he told him that "he had a great deal of pain in his head, and that his neck was hardly able to support his head, unless he could get where he could rest it upon his hand or some object forward of him." *Held*, that the testimony should be taken as though the witness was not a physician; but that it was admissible as referring to his then present condition.

ACTION for injury on the highway. Trial by jury, September Term, 1879. Orleans County, REDFIELD, J., presiding. Pleas, general issue and notice. Verdict for plaintiff. The exceptions stated:

"The plaintiff's testimony showed that the highway at the place where the injury occurred was fully three rods wide, and that the wrought or travelled part of the same was thirty-eight feet in width; that at said point the highway was slightly descending, going in a southerly direction, and that on the westerly side there was a steep embankment in the vicinity of twenty-two feet high, and several rods long, and that at the foot of the same there was a mill pond, and that there was no muniment or railing to prevent going off said embankment;

That the brink of said embankment was six inches beyond the westerly limit of said highway as located and established, and defendant's evidence showed it somewhat more, and that the highway was substantially level up to the brink, there being no

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ditch ; and that this injury occurred in the night time of the day of . . . A. D. 1877, while driving over said road going south ;

That the highway at and north of the place of accident was not straight, but curved to the east so that a straight line established along the centre of the travelled track at a point about 10 rods north of the place of accident, if extended in a straight course southerly, would go off the bank above described just southerly of the place of accident ;

That in consequence of the darkness he was unable to see the road and its surroundings, and drove off the brink of the embankment at the point before described. His wagon was overturned, and he was thereby thrown down said bank, and landed at its foot in a sitting posture in the soft earth or mud.

The plaintiff's evidence further tended to show that in consequence of the fall his spine and one of his hips were greatly injured so that he had suffered great pain, and been' unable to perform labor to any considerable extent for quite a part of the time since the injury. During said trial the plaintiff introduced Dr. J. F. Skinner, who testified that he was a physician and surgeon of long practice ; and that during the winter of the plaintiff's injury he called at the plaintiff's house to transact some business with him, and while there had some talk with him about his condition, and among other things stated as follows (in part) :

Q. Did you learn his case and examine him at all at that time, or interest yourself in it ?

A. Not with a view of prescribing, nor with any expectation of giving evidence. . . .

The doctor's testimony was objected to. Judge REDFIELD stated :

" I don't think the mere naked narration, weeks after the accident, to Dr. Skinner is any more admissible than to any other person, unless he took some notice, professionally, of the declaration that he made in connection with certain disabilities that the doctor noticed. The doctor was not there on professional duty, and he made no examination professionally. But if the doctor listened to his narration, and observed something about him as he explained his symptoms, so far I think it is admissible. You may relate, doctor, under their objection, anything you discovered about him and what he said either in answer to your questions, or the explanation he gave to you in connection with the disabilities you observed."

A. " I discovered that he moved with considerable effort in

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getting up from the lounge on which he was reclining, I think when I went in, and sitting in the chair. . I noticed that while sitting there was a table forward of him, and he seemed to require for his support something forward of him to enable him to sit in the chair with any degree of ease and comfort, and on my inquiry, as I should of any neighbor as to how he felt, he said he had a great deal of pain in his head, and that his neck was hardly able to support his head, unless he could get where he could rest it upon his hand or some object forward of him."

Belden & Ide, for the defendant, cited on the question that Dr. Skinner's testimony was not admissible, *Knox v. Wheelock*, 54 Vt. 150; *Bacon v. Charleston*, 7 Cush. 585; 1 Phil. Ev. marg. p. 183; on the question that the court erred in not directing a verdict for the defendant, as the plaintiff's own evidence showed that the defect was outside of the limits of the highway. G. S. c. 25, ss. 1, 41; *Brown v. Fairhaven*, 47 Vt. 390; *Page v. Weathersfield*, 18 Vt. 424; *Morse v. Richmond*, 41 Vt. 485; *Sparhawk v. Salem*, 1 Allen, 30; *Sykes v. Pawlet*, 43 Vt. 449; *Whitney v. Essex*, 38 Vt. 270; *Abbott v. Wolcott*, 38 Vt. 666; *Johnson v. Irasburg*, 47 Vt. 28; *Hutchinson v. Concord*, 41 Vt. 271; *Rice v. Montpelier*, 19 Vt. 470; 131 Mass. 452; *Ozier v. Hinesburgh*, 44 Vt. 221; Angell Highways, 291; *Kelley v. Fond du Lac*, 31 Wis. 186; *Cobb v. Standish*, 14 Me. 198; *Willey v. Ellsworth*, 64 Me. 57; 66 Me. 348; 68 Me. 365; *Tisdale v. Norton*, 8 Met. 388; 105 Mass. 600; 100 Mass. 256.

William W. Grout and *L. H. Thompson*, for the plaintiff, cited on the question that Dr. Skinner's testimony was admissible, 6 East. 38, 187; 32 Vt. 404; ib. 591; 45 Vt. 275; 11 Allen, 322; 7 Cush. 381; 1 Greenl. Ev. s. 102; 48 Vt. 335; 54 Vt. 150; on the question that the highway was insufficient, *Leicester v. Pittsford*, 6 Vt. 245; *Green v. Danby*, 12 Vt. 338; *Cassedy v. Stockbridge*, 21 Vt. 391; *Willard v. Newbury*, 22 Vt. 458; *Sessions v. Newport*, 23 Vt. 9; *Hill, Adm. v. New Haven*, 37 Vt. 501; Sher. & Redf. Negl. s. 390; *Kelsey v. Glover*, 15 Vt. 708; 43 Vt. 192; 45 Vt. 72; 1 Allen, 30; *Alger v. Lowell*, 3 Allen, 402; *Stevens v. Boxford*, 10 Allen, 25; *Adams v. Natick*, 13

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Allen, 429 ; 105 Mass. 470 ; *Marshall v. Ipswich*, 110 Mass. 526 ; *Warner v. Holyoke*, 112 Mass. 367 ; *Willey v. Portsmouth*, 35 N. H. 303 ; *Hill v. Davis*, 41 N. H. 333 ; 59 Ga. 544 ; 44 Barb. 386, 395 ; *Hey v. Philadelphia*, 81 Pa. St. 45 ; 71 Pa. St. 276 ; Wood Nuisances, s. 378.

The opinion of the court was delivered by

ROWELL, J. The testimony of the witness Skinner must be taken the same as though he was not a physician, as he was not in professional attendance upon the plaintiff. But we think that what the plaintiff told him about having pain in his head and his neck not being able to support his head, had reference to his then present condition, and so admissible under our decisions.

Nor do we think there was error in refusing to direct a verdict for the defendant, as requested. We think it was a question of fact for the jury to find, under all the circumstances, whether the road was sufficient or not. It is conceded that this is the general rule when the defect complained of is *within* the limits of the way, but contended that when no such defect exists, towns are not legally bound to guard the traveller from receiving injury *beyond* the limits by reason of steep banks, precipices, and the like, although in dangerous proximity to the way. Many things may constitute insufficiencies in highways ; and the lack of railings or other muniments, when necessary to the safety of the travel, is a very frequent defect. It was the duty of towns to keep their roads in a reasonable state of repair, not only in their "surface and margins," but in their "muniments" as well. *Glidden v. Reading*, 38 Vt. 52. Besides, they were bound to construct and maintain their roads reasonably sufficient with reference to such accidents as might be expected occasionally to occur upon them. *Lindsey v. Danville*, 45 Vt. 72. It was further their duty to keep their roads reasonably safe for travel by night as well as by day ; and the public had a right to presume that they were so. *PIERPONT, C. J.*, in *Bagley v. Ludlow*, 41 Vt. 434. If a railing is lacking where one is necessary to the safety of travellers, the travelled way itself is thereby rendered unsafe and out of repair. And it makes no difference whether this necessity for a railing is

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created by the condition of things *within* the limits of the way or *without* the limits, but in dangerous proximity to the way. In either case the question is, Does the safety of the traveller require a railing? Is the road reasonably safe and sufficient without one? In this case the insufficiency complained of is the lack of a railing or other muniment to guard against the steep bank that came within about six inches of the westerly limit of the highway, the surface of the ground at this point being smooth and level to the very brink, not affording even the obstruction of a ditch or a rough margin to warn the traveller that he is out of the road.

This is in no just sense a case of voluntary departure nor of straying from the way, like many of the cases relied upon by the defendant, and the law of those cases is not applicable. It cannot be said, as argued, that the plaintiff "intended the act he did, though he did not intend the consequences." He intended neither. The case affords no warrant for saying that he did. By reason of the darkness he could not see where he was going, and *accidentally* drove off the bank. That is the case. Now suppose we adopt the defendant's contention, that the defect must exist *in the way*, not beyond its limits, in order to render the town liable. That, again, is this case; for the lack of a railing, which the jury has said was necessary, was a defect *in the way itself*. *Hayden v. Attleboro*, 7 Gray, 338. In that case the injury arose from being precipitated into a cellar that was either within the limits of the way or in such close proximity thereto as to render travelling along the way dangerous. The defect complained of was the want of a railing. The court said that the want of a railing necessary to the safety of travellers was a defect *in the way itself*, for which the town was liable. In *Coggswell v. Lexington*, 4 Cush. 307, the injury was occasioned by a post outside the way as located. The court, not deciding whether the town had the right as against the owner of the land on which the post stood to enter and remove it, said "it clearly had the right, and it was its duty, if it could not lawfully remove the post, to place such a fence or other barrier between it and the road as would have rendered the road safe." The law of Massachusetts on this subject is tersely stated by GRAY, C. J., in the recent

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case of *Puffer v. Orange*, 122 Mass. 389. "A town is bound to erect barriers or railings, where a dangerous place is in such close proximity to the highway as to make travelling on the highway unsafe. But it is not bound to do so, to prevent travellers from straying from the highway, although there is a dangerous place at some distance from the highway which they may reach by so straying." In *Warner v. Holyoke*, 112 Mass. 362, the court says: "The law has nowhere undertaken to define at what distance in feet and inches a dangerous place must be from the highway in order to cease to be in close proximity to it. It must necessarily be a practicable question, to be decided by the good sense and experience of the jury." It seems to us that this is the only practical rule that can be adopted; and that, as a general rule, it is for the jury to say, in the concrete case, whether the place is sufficiently near the highway to render travelling upon it unsafe unless guarded against, and that, as said in *Adams v. Natick*, 18 Allen, 432, this "must be determined by the character of the place or object between which and the traveled road it is claimed that the barrier should be interposed." As said by HOAR, J., in *Alger v. Lowell*, 3 Allen, 405: "The true test is, not whether the dangerous place is outside of the way, or whether some small strip of ground not included in the way must be traversed in reaching the danger, but whether there is such a risk of a traveller, using ordinary care in passing along the street, being thrown or falling into the dangerous place that a railing is requisite to make the way itself safe and convenient."

Nor do we think the Massachusetts doctrine is based on any peculiar wording of their statute, which provides that "highways . . . shall be kept in repair, . . . so that the same may be reasonably safe and convenient for travellers." Pub. Sts. c. 52, s. 1. Our statute provides that highways shall "be kept in good and sufficient repair," so that, as this court has always in effect said, "the same may be reasonably safe and convenient for travellers."

The Maine cases relied upon by the defendant are not opposed to the Massachusetts cases. In *Willey v. Ellsworth*, 64 Me. 57, it is said in the head-note, that "when a railing is necessary for

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the safety of travellers, the want of such a railing is a defect in the way for which the town is responsible"; and *Hayden v. Attleboro* and *Cogswell v. Lexington* are cited and commented upon approvingly by the court. But the real question in that case was one of variance. The defect complained of was a snow-drift in the highway, as alleged in the declaration; but the plaintiff was allowed to prove the existence of a snow-drift *without* the located limits of the highway, and to recover damage resulting therefrom. The court said that proof of a snow-drift without the highway in no way proved or tended to prove the allegations in the declaration; that the verdict was obviously for a defect not mentioned in the declaration, for that alleged a drift in the highway; that the only possible defect in the highway was that there was no barrier to prevent travellers from going out of the road, but that no such defect was alleged. An examination of *Doyle v. Vinalhaven*, 66 Me. 348, *Blaks v. Newfield*, 68 Me. 365, and other Maine cases, will show, we think, that the Massachusetts doctrine on this subject is adopted there. It is also adopted in New Hampshire. *Willey v. Portsmouth*, 35 N. H. 308.

But we do not mean to be understood as sanctioning the doctrine that towns were bound to erect railings merely to keep travellers from *straying* out of the highway, where there was no unsafe place in dangerous proximity thereto. On the contrary we would require the party to show that the defect that caused the injury existed either in the highway or so contiguous thereto, as to make it dangerous to travel on the highway itself. Nor does this doctrine run counter to any case in this State. It was in nowise involved in *Page v. Weathersfield*, 18 Vt. 424. The only question decided there was, that "no action can be maintained against a town for an injury happening on a road or way opened by private individuals on their own land for their private use, although it has been travelled for a great number of years, if no act of the owners and the selectmen of the town has ever been done, recognizing it as a public road." *Sykes v. Pawlet*, 43 Vt. 446, is not analogous. It was a case of voluntary departure from the highway for the purpose of driving under a private shed beyond its limits, in getting out of which, plaintiff

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backed his team over an unguarded bank. In *Brown v. Fairhaven* and *Westhaven*, 47 Vt. 386, the defective way was not in the defendant towns, but in the State of New York, and therefore it was held that the statute was not broad enough to charge them with liability.

Judgment affirmed.

Dissenting opinion by

Ross, J. I find myself unable to concur in the judgment rendered in this case by the majority of the court. On the facts stated in the exceptions, it seems to me that the judgment is a practical unsettling of the law of the liability of towns for the condition of their highways as heretofore determined and announced by this court, and greatly enlarges that liability as it existed under the statute as it stood at the time of the injury. Since then the statute has been so far modified, that at present they are liable to travellers for injuries sustained through insufficiencies only in the culverts and bridges of their highways. The question involved in the decision of this case is still one of considerable practical importance. The exceptions state: "The plaintiff's testimony showed that the highway at the place where the injury occurred was fully three rods wide, and that the wrought or travelled part of the same was thirty-eight feet in width; that at said point the highway was slightly descending, going in a southerly direction, and that on the westerly side there was a steep embankment in the vicinity of twenty-two feet high and several rods long, and that at the foot of the same there was a mill pond, and that there was no muniment or railing to prevent going off said embankment; that the brink of said embankment was six inches beyond the westerly limit of said highway as located and established, and defendant's evidence showed it somewhat more; and that the highway was substantially level to the brink, there being no ditch; and that this injury occurred in the night time of the

day of

A. D. 1877, while driving over said

road going south; that said highway at and north of the place of accident was not straight, but curved to the east so that a straight line established along the centre of the travelled track at a point

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about ten rods north of the place of accident if extended in a straight course southerly would go off the bank described just southerly of the place of accident ; that in consequence of the darkness he was unable to see the road and its surroundings, and drove off the brink of said embankment at the point before described." Upon these facts appearing from the plaintiff's own showing, the defendant requested the court to direct a verdict in its favor. The court refused this request. I think the request should have been granted. Observe that the place of danger was wholly without the limits of the highway, that the only defect complained of was the absence of a railing or muniment to guard against going over the embankment, and that "in consequence of the darkness the plaintiff was unable to see the road and its surroundings, and drove off the brink of said embankment." It is to be noticed that the cause for the plaintiff's departure from the wrought and travelled portion of the highway and for driving over the embankment located outside of the limits of the highway, was his inability to see the travelled track and its surroundings,—or the darkness. Hence it follows if this decision is to obtain and become the established law of the State, whenever the traveller on account of the darkness departs from a travelled track of sufficient width and smoothness to accommodate and safely carry the prudent traveller in the daylight, and runs against a hitching-post, lamp-post, shade-tree, stump, rock, bank, or into a ditch or other place likely to overturn his carriage, located on the margins of the highway or in the immediate proximity to such margins, and receives an injury to himself or team, the town is liable. When the facts are not in dispute the liability of the town thereon is a question of law to be determined by the court, and not of fact for the consideration of the jury. It was so held in *Abbott v. Wolcott*, 38 Vt. 666. In *Swift v. Newbury*, 36 Vt. 355, it is said : "We do not controvert the proposition that, under certain circumstances where there is no dispute or controversy about the facts the want of proper care in the traveller may be inferred as a conclusion of law." Cases are cited sustaining the proposition. In *Barber v. Essex*, 27 Vt. 62, the late Chief Justice REDFIELD says : "Questions of negligence where the law has settled no rule of

diligence can never be determined as a matter of law, except where the testimony is all one way. If there is no testimony tending to show negligence, then it may be determined by the court there was no negligence. . . . Or if the testimony is uncontradicted and makes a clear case of negligence, it becomes matter of law only." The defendant's request was based on the facts as shown by the plaintiff in regard to which there was no controversy. On these authorities, as well as upon general principle, if the facts were such as called for it, it was the duty of the court to have complied with the request. Do the facts shown by the plaintiff's testimony show a liability on the part of the town for the injury sustained by the plaintiff? I think not. It is to be observed that the wrought portion of the highway was smooth and without imperfection, thirty-eight feet wide—wide enough for four single teams to drive abreast. In other words, as the statute was at the time of this accident, towns to escape liability must either sufficiently light their highways to enable the traveller to see and follow the travelled track, or must enclose such track so that when used in the night the traveller cannot pass therefrom upon objects of danger on the margins of the highway, or in the immediate proximity thereto. If it renders passable the whole width of the highway it must then securely fence it so that the traveller may not wander from it when the darkness is too great to enable him to follow it. There is not, probably within the State, a half mile of continuous highway that is not insufficient and out of repair under this decision. Every place of danger on the margins of the highway or in the immediate proximity thereto, unguarded by a railing or muniment becomes an insufficiency whenever the darkness is so great that the traveller is unable to see the road and its surroundings, though they may not be such in the daytime. I do not think it would be claimed that this highway was insufficient as regards this plaintiff if he had driven or gone over the embankment under like circumstances in the day time. If the exceptions had read: "That in consequence of the daylight he was able to see the road and its surroundings, and drove off the brink of said embankment at the point before described," I do not think, any one would claim it would not have been the duty of the court to

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have ordered a verdict for the town. I do not think the darkness operated to change the sufficiency of the highway or the liability of the town. I am aware that my associates who concur in the judgment, deny that it has any such scope. But no analysis which I can give to the facts brings its scope within narrower limits. No necessity for the plaintiff's departure from the wrought portion of the highway, or the highway limits, except the darkness, is disclosed. There was no giving away of a nut or bolt of the carriage, or breaking of the harness, no fright or shying of the horse, no meeting or passing of another team ; in short, there was nothing that compelled, or in the least influenced, the plaintiff's departure from the smooth travelled track except the darkness. Hence, granting that the highway was insufficient by reason of the lack of a railing or muniment, as against a traveller who should be found out of the road and off the embankment by an accident or some necessity, the plaintiff's going off there was not from any such cause, unless darkness be such cause. From that cause and that alone in the language of the exceptions, "he was unable to see the road and its surroundings, and *drove* off the brink of said embankment." No decision in this State, heretofore, has gone so far as to hold that a party, who departed from the travelled track of the highway solely by reason of darkness, or his inability from that cause to see and follow the travelled track, and sustained an injury upon a dangerous object located on the margin of the highway or in the field or lot immediately contiguous thereto, could recover. In *Hunt & Wife v. Pownal*, 9 Vt. 411, it was held that where the plaintiff was forced out of an insufficiently guarded travelled track over an embankment by the breaking of a nut or bolt, and received injuries, the town was liable. The doctrine of that case and all subsequent cases which have adopted it, is, that an injury sustained from the combined result of an insufficiency of a highway, and an accident which could not have been foreseen and provided against by the exercise of common prudence, the town must compensate. But it has never before been held in this State, or elsewhere, so far as I am aware, that darkness was such an accident. It would seem that the traveller could better provide against the darkness than the town. He knows when the

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darkness so overshadows him that he cannot see the road and its surroundings, and can reasonably provide against it. The town never can know when such darkness will be present, or when the traveller will have occasion to use the road surrounded by such darkness; nor can it secure him against it without great and unreasonable expense. I do not think, the statute was ever intended to impose any such burden or liability upon towns. It has been usually, and I might say universally, held, that while the statute imposes the duty upon towns to make and maintain their highways so that they should be reasonably safe for the safe passage of the prudent traveller thereon, including such accidents as might reasonably be expected to befall him, such as the breaking of his carriage or harness, or the shying or fright of his horse, when these had been selected and used with prudence, or being forced from the travelled track by meeting or passing another team either under control or at large, it was equally the duty of the traveller to find and keep within the travelled and wrought portion of the highway, and to use the same prudently and not to depart therefrom except from actual necessity. In *Rice v. Montpelier*, 19 Vt. 470, a hole had been dug in the margin of the highway and near the travelled track, of which the town had notice, and the plaintiff ran into it upon a dark night, whereby his horse and sleigh were injured. The travelled track was twenty to thirty feet wide and level for travel. "The defendant requested the court to charge the jury, as matter of law, that if the plaintiff in a dark night went out of the travelled path of the road for the purpose of getting upon snow" . . . or "for his own comfort and convenience, and run into the hole, and the injury happened, he could not recover." The court refused so to charge, and left the whole question to the jury to find whether the road was reasonably safe, and whether the plaintiff was wanting in common care and prudence in the use of it. This plaintiff had a verdict. This court reversed the judgment, and held, in summing up, this language: "We think the jury should have been instructed that if they found that the plaintiff diverged from the travelled road without necessity, but merely for the purpose of having the benefit of the snow, or if the horse took the same direction from natural instinct or from

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inability to see the road on account of the darkness, the town should not be held responsible for the consequences which ensued." The doctrine thus announced has until the rendition of this judgment been considered the law of the State.

It has been recognized as such in *Cassidy v. Stockbridge*, 21 Vt. 391; *Morse et ux. v. Richmond*, 41 Vt. 435, and *Glidden v. Reading*, 38 Vt. 52. In the last case it is held that it is not necessary that the traveller should be *forced* from the travelled track, but that he may voluntarily leave it from *necessity*. In that case the necessity was,—he being blind,—the avoidance of a team which he heard coming in the darkness towards him. But this falls exactly within the doctrine announced in *Rice v. Montpelier*, *supra*, in which it is held that the traveller could not recover for an injury sustained upon the margin of the highway, if he diverged from the travelled road *without necessity*, and "inability to see the road on account of the darkness" is held not to be a necessity for such divergence. My associates have passed over this feature of the case, with the single remark: "This is in no just sense a case of voluntary departure, nor straying from the way, like many of the cases relied upon by the defendant, and the law of those cases is not applicable. It cannot be said, as argued, that the plaintiff 'intended the act he did though he did not intend the consequences.' He intended neither. The case affords no warrant for saying he did. By reason of the darkness he could not see where he was going, and *accidentally* drove off the bank. That is the case." I quite agree, "that is the case; but am unable to see—perhaps because darkness has fallen upon me—why the doctrine of *Rice v. Montpelier* is not applicable, when it is there said in substance, if the plaintiff's departure from the road was occasioned by an "inability to see the road on account of the darkness" he could not recover. It is asserted that the plaintiff "accidentally drove off the bank" because by reason of the darkness he could not see where he was going." Webster defines "accident" as "an event that takes place without one's foresight or expectation." It may well be said that his going over the embankment was without the foresight or expectation of the plaintiff, and so accidental. But it cannot well be said

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that the darkness came upon the plaintiff "without foresight or expectation." That was no accident to him. There was not, therefore, in any just sense, an accident concurring with an insufficiency of the highway, which compelled or influenced the plaintiff's departure from the travelled track to his injury, as in *Hunt v. Pownal*, *supra*. In *Morse and wife v. Richmond*, in which the court had under consideration the duty of towns in regard to the margin of their highways, the court plainly indicates that towns are, or as the statute then stood, were, not under a duty to travellers to keep the margins of their highways entirely free from places of danger, and, substantially, because it is the duty of the traveller to keep in the wrought portion or travelled track of the highway. In a country like ours, of hillsides and valleys, filled with rocks and stumps, where ditches and banks are an absolute necessity, it would be almost an impossibility to construct and maintain highways, so that their margins, or places in "dangerous proximity" thereto, would be entirely free from objects endangering travel if encountered by it. In a note to that case by the learned late Chief Justice REDFIELD, he says: "All (statutes) substantially agree in requiring the municipality to provide and maintain a safe and convenient passage for travellers. This, unquestionably, primarily applies to the travelled portion of the highway. So that one who for mere convenience, and without actual necessity, departs from the travelled portion of the highway cannot recover for any injury he may sustain thereby in consequence of obstructions to passage." I have never understood that a railing or muniment was required to protect the traveller from a dangerous place or object on the margin of the highway unless his departure from the travelled track was from necessity. In *Bagley v. Ludlow*, 41 Vt. 425; *Swift v. Newbury*, *supra*; *Barber v. Essex*, 27 Vt. 62; *Glidden v. Reading*, 38 Vt. 52, and *Cassidy v. Stockbridge*, 21 Vt. 391, the element of darkness is found, but in none of them is it given the force of a necessity compelling or warranting the departure of the traveller from the wrought portion of the highway; but there was in each in which there was such departure another cause which compelled or rendered a departure therefrom a necessity. This element is given

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effect only upon the question of whether the plaintiff was at the time in the exercise of common care and prudence. It is plainly intimated that darkness increases the care and prudence to be exercised by the traveller ; and in *Barber v. Essex, supra*, it is intimated that the darkness might be so great as to render it imprudent for the traveller to proceed without a light. On the other question, largely discussed in the opinion of the court and at the bar, whether a town is bound to protect the traveller against an object of danger in the immediate proximity to but not within the limits of the highway, when *necessarily* brought in contact with it, I express no decided opinion. The cases from Massachusetts show the difficulty of determining upon any safe rule as to what places of that character shall be adjudged to be within "dangerous proximity" of the highway. While good reasons can be given for holding towns liable for injuries received at such places when brought in contact with them from actual necessity, there is very considerable difficulty in drawing any safe line marking the limit of the liability of towns except at the limits of the highway. On the other point I cannot but think that my associates have made a new and unwarranted departure in the law of the liabilities of towns for the condition of their highways, and of the rights of travellers in using them ; and am compelled to dissent from the affirmance of the judgment rendered by the County Court. I should reverse that judgment.

Rules for the Admission of Attorneys.

ADOPTED UPON RECOMMENDATION OF THE BAR ASSOCIATION OF VERMONT.

RULE I.

Each applicant for admission as an attorney of the County Court and the Supreme Court shall be at least twenty-one years of age and of good moral character ; and shall have studied in the office of an attorney or attorneys of the Supreme Court three years next previous to such application, the last six months thereof in the county where such applicant resides at the time his application is made. Provided that time actually spent in regular attendance at a law school chartered by any of the states of the United States or established as a department of any college or university so chartered, and maintaining a stated course of exclusively legal study, for the purpose of this rule shall be equivalent to the same amount of time of study in an attorney's office, except for said last six months of said three years.

RULE II.

Any person proposing to study law with the intention of applying for admission as an attorney in this state shall file with the clerk of the county where he resides, as soon as practicable after he commences such study, a notice stating that he has commenced the study of the law with the intention of becoming an attorney, and with whom and where he so commenced such study ; and also a certificate of the attorney or attorneys with whom he is studying, stating that he is so engaged and when such time of study began ; and the three years provided for by Rule I shall commence from the date of filing said notice and certificate. Provided, however, that any person now pursuing the study of law may file such notice and certificate before June 1, 1884, and in such case said three years shall commence from the date stated in such attorney's certificate as the date of commencement of study.

RULE III.

Every applicant for admission as an attorney shall file with the clerk of the county where he resides, at least fourteen days before the session of the General Term of the Supreme Court, a petition for such admission, verified by his affidavit, stating his age, residence, time of study, and with whom and where such studies have been pursued, accompanied by an affidavit or affidavits of an attorney or attorneys of the Supreme

Court, stating that the applicant's studies have been actually pursued as required by Rule I, and also accompanied by certificates of at least three such attorneys that the applicant is of good moral character. All such petitions shall be transmitted to the clerk of the county where the General Term is held before the opening of such term, together with the notices and certificates previously filed by the petitioner under Rule II.

RULE IV.

Such applicants shall be thoroughly and impartially examined on the first Tuesday of such General Term at the place of its session by not less than three members of a committee of the bar to be appointed by such Court for that purpose, and if found in all respects qualified, and their admission is recommended in writing by such committee, the Court shall thereupon cause the proper oaths to be administered, and such applicants shall be admitted as attorneys of the County and Supreme Court.

The committee appointed at each General Term shall act as such committee until the adjournment of the General Term of the year next succeeding their appointment.

RULE V.

Examinations shall be conducted in public, and shall be both oral and written. Reports of committees shall state the method of examination adopted, and the standard of qualification required by them as the basis of their certificate.

RULE VI.

No person shall be admitted to the bar except as aforesaid ; provided, however, that attorneys from other states may be admitted as attorneys of the courts of this state without other examination, upon proof that the applicants are attorneys of the highest courts of such other states, and that they have practiced law one year as such, and are of good moral character, and have resided six months, next preceding their application, in the county in this state from where the application is made : and provided further, that the Supreme Court, upon sufficient cause shown in a particular case, may allow study in an office outside the state as an equivalent for the study within the state required by Rule I.

SUPREME COURT, General Term, 1883.

The foregoing Rules, adopted upon recommendation of the Bar Association of Vermont, and to take effect in substitution of existing Rules June 1, 1884.

Done in Court this 8th day November, A. D. 1883. Attest,

MELVILLE E. SMILIE, Clerk,

A true copy. Attest,

MELVILLE E. SMILIE, Clerk.

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APPEAL.

1. A respondent is entitled to an appeal from a justice court, although he neglects to procure bail. *See* CRIM. LAW. In re *Kennedy*, 1.

2. A set-off can only be pleaded against all the plaintiffs ; hence, an action having been brought in the name of the husband and his wife, the matter in demand not exceeding \$20, as shown by the writ and specification, and the defendant in the justice court *pleading in set-off against the husband alone* an amount greater than \$20, such action is not appealable. *Clough v. Clough*, 360.

3. None from the decision of selectmen on resurvey of highway. 412.

4. Allowed from Probate Court under the fraud, accident and mistake statute, when wrong bond had been filed in the first suit. 434.

5. From justice court under same statute when the County Court hold that he pleaded in good faith an offset of over \$20. 503. *See* PAUPER.

APPLICATION OF PAYMENT. *See* PAYMENT.

APPRAISAL AND ASSESSMENT. *See* TAX 2 and PAUPER 7.

ARBITRATION AND AWARD.

1. Award final. An award, though erroneous, if fairly made, is as conclusive upon the parties as a judgment ; hence B. having sold lumber to M., and C. claiming to be its owner, having brought an action of trover against M. and recovered, and afterwards, but before the judgment was paid except by note, B. and M. having "arbitrated all matters of difference between them," and the arbitrators only allowing M. what he had paid for the lumber, and not his costs in defence of its title, it was *held*, that the award was conclusive, and that M. could not sustain an action against B. to recover such cost. *Morse v. Bishop*, 231.

2. Without written pleadings an award may be used as a defence before a referee. *Ib.*

3. An award under seal is a specialty within the meaning of the Statute of Limitations ; and this is so though the submission was by parol. *Halmon v. Halmon*, 321.

4. Verbal assignment of a written award for land damages, valid. 167.

ARRESTED in one county, imprisoned in another ; action for. 358.

ARREST OF JUDGMENT.

See INTOXICATING LIQUOR and p. 547.

ARREST, MALICIOUS, of railroad engineer to delay the train.

See MASTER AND SERVANT.

ASSESSMENT. *See* PAUPER 7 ; TAX 2 ; INSURANCE.

ASSAULT. It may be an assault if one person strike a horse attached to a wagon in which another person is sitting. *See* TRESPASS 3 and p. 259.

ASSETS, MARSHALLING OF, when refused partnership creditors. *See* PARTNERSHIP and p. 235.

ASSIGNMENT, *See* MORTGAGES 18, 21 ; of written award for land damages. *See* CHANCERY 3 and p. 167.

ASSIGNEE. *See* PAYMENT.

ASSUMPSIT.

1. USE AND OCCUPATION. The plaintiff, as guardian having control of certain land, leased it to the defendant, and charged for the use of the same in his own book account against him, with the knowledge and approval of the defendant. Afterwards the plaintiff in settling his guardian account with the Probate Court charged himself with this item as cash received of the defendant. Subsequently the defendant knowing all the facts agreed to pay the plaintiff. *Held*, that the item is recoverable in assumpsit although there is no count for use and occupation. *Chapman v. Goodrich*, 354.

2. Sustainable in name of holder, based on certificate of dividend issued by a railroad company on preferred stock. 139.

ASSUMPTION of prior mortgages by purchaser of equity of redemption, not implied. 205.

ATTACHABLE, products of wife's realty, when not. 18.

“ exempt property, its increase, wife's earning, &c., given wife by husband, when not. 362.

“ forage, when not, *See* EXEMPT 2 and p. 229.

ATTACHING CREDITORS. *See* CREDITORS; FRAUD; GIFT; EVIDENCE.

ATTACHMENT.

1. When superior to unrecorded lien. 227.
2. But not, if notice, &c. 174.
3. Of one's own property sold conditionally not a waiver of his rights under the sale. 308.
4. In making an attachment the copy left in the town clerk's office must describe the property with reasonable certainty, such as will inform the debtor, and those with whom he may deal, that it is attached. *Pond v. Baker*, 400.
5. The return on the copy left with a lessee, or town clerk, in order to create a valid attachment of the property of a lessor, must contain a specific description of the property attached. *Ib.*
6. When an officer is a party justifying under his official acts, his return is evidence; but where the return only shows that a *list of the property* was indorsed, it was properly excluded. *Ib.*
7. The Supreme Court remanded, on motion, the cause to give an opportunity to amend the officer's return. *Ib.*

ATTORNEYS.

1. In a bill in equity to enjoin the prosecution of an action brought on a promissory note, the defendants, B. and L., were the attorneys in said action for defendant, H., and were joined with him in this bill. *Held*, a misjoinder, as there was no claim that the *attorneys acted fraudulently*. *Hastings v. Belden*, 273.
2. Attorney fees not allowed a trustee in his accounting in chancery, when. 378.
3. In action on injunction bond attorney fees, not the direct result or the injunction, are not allowed. 470.

AUDITA QUERELA.

1. A writ of *audita querela* brought in the County Court to vacate a

record in the Supreme Court was improperly issued. *Ross v. Shurtleff*. 177.

2. The levy was made in 1869 ; *audita querela* brought to set it aside in 1877 ; if there was any error it was cured by statute, R. L. ss. 1596, 1598. *Ib*.

AUTHORIZED PERSON cannot serve order of removal. 323.

BAIL, respondent entitled to an appeal from justice court although he neglects to procure bail. In re *Kennedy*, 1.

1. **BAILMENT**. A national bank must take the same care of bonds deposited with it for safe keeping that it does of its own. See **BANK**. *Whitney v. National Bank*, 154.

2. As to liability of agister of cattle. See **AGISTMENT** 1, 2 ; **PLEADING** 1. See **BANK**.

BALANCE OF ACCOUNT. See **STATUTE OF LIMITATIONS** AND p. 356 ; **TRUSTEES** 11 and p. 383.

BANK.

1. **BAILMENT**. The plaintiff delivered to the defendant bank \$4000 of U. S. bonds and received this writing : " Received of J. D. Whitney four thousand dollars, for safe keeping as a special deposit. S. M. WAITE, C." *Held*, that it was a naked deposit without reward ; that the defendant would not be liable for the robbery or larceny of the bonds, unless there was complicity or bad faith ; that it was answerable only for *fraud* or for *gross* negligence ; that the law demands good faith, and the same care of the plaintiff's bonds as defendant took of its own of like character. *Whitney v. National Bank*, 154.

2. **GRATUITOUS**. The bonds were not delivered at the *solicitation* of defendant ; the bailment was *gratuitous* ; and it was error for the court to allow the jury to *speculate* as to the benefit derived from the purchase and sale of coupons. *Ib*.

3. It was error to instruct the jury that there might be a benefit to defendant, " perhaps in the sale of the bonds," when by contract it had no right to sell or use the bonds ; and also error in using these words, " perhaps in some other way,"—a way not disclosed by the evidence. *Ib*.

4. Evidence showing that other depositors of bonds in this bank had been misused, or wronged by the cashier, is not admissible to prove that the plaintiff was. *Ib*.

5. The facts, that the safe was left open during the transaction of business, that there was no gate in the passage way from the rear of the banking room, behind the counter, that only one person was left in charge of the bank about noon each day, do not seem so unusual as to be accounted negligence, much less gross negligence. *Ib.*

6. **NEGLIGENCE.** The true test of gross negligence in this case is whether the defendant took the same care of these bonds as it did of its own. *Ib.*

7. No notice having been given the defendant to produce its books, no request for their production during the trial, no evidence that there was any entry in them touching the bonds, and the books being in the hands of the receiver, it was error for the court to charge that their non-production might be considered by the jury to the defendant's prejudice. *Ib.*

8. If a party fails to call for books, when he has a right to have them, it will not be presumed that there are entries in them beneficial to such party. *Ib.*

9. **BANK STOCK** *could not be sold for taxes till Act of 1882, &c.* Prior to the passage of the statute of 1882, No. 11, s. 2, expressly providing therefor, bank stock could not be legally taken and sold on a tax warrant; hence, the plaintiff, as constable, having sold certain bank stock to the defendant, and he having promised to pay for the same, in an action based on the promise, *held*, that the selling was without law, and the promise without consideration. *Barnes v. Hall*, 420.

BANKRUPTCY.

1. **INSOLVENT ACT.** *Discharge.* A discharge under our insolvent law does not bar a debt contracted before its passage, the creditor in no way becoming a party to the proceedings in insolvency. *Conway v. Seamons*, 8.

2. Nor, though the debt was *merged* in a judgment after its passage. *Ib.*

3. An act discharging such debt is unconstitutional. *Ib.*

4. **FOREIGN CREDITOR.** A debt contracted and payable in Canada by a person resident in this State to a person resident in Canada is not barred by a discharge under the U. S. Bankrupt Act, when the foreign creditor neither proved his debt in bankruptcy, though provable under the act, nor in any way was a party to the proceedings, nor had personal notice thereof. *McDougall v. Page*, 187.

5. **REVIVAL.** A clear, distinct, and unequivocal promise to pay is essential to a revival of a debt barred by a discharge in bankruptcy. *Ib.*

6. **COMPOSITION PROCEEDINGS.** A debt is not discharged by composition proceedings under the U. S. Bankrupt Act, when the name of the creditor and his debt were not placed on the schedule of creditors and debts filed in court. *Clay v. Severance*, 300.

7. **BURDEN OF PROOF. NO PRESUMPTION.** The burden is on the party who claims that the debt was discharged to prove that the creditor's name was on the schedule; hence, when a referee's report only states generally that the bankrupt compromised with his creditors, and that the composition offered by him "was accepted by the several creditors," the court will not *presume* that the plaintiff's name was on the list of creditors and debts, although the plaintiff was one of such creditors. *Ib.*

BEQUEST. *See* WILL.

BETTERMENT. *See* EJECTMENT and p. 58.

BILL OF RIGHTS—common law jury of twelve men. 1.

“ “ how it applies to minor offences. 211.

“ “ how it limits the right of eminent domain. 210.

BILL IN CHANCERY. *See* CHANCERY.

BILL in the nature of a cross-bill. 236.

BILLS AND NOTES.

1. The prayer of a bill in chancery to enjoin the collection of a note should be to reform the note according to the agreement of the parties. *See* CHANCERY. *Hastings v. Belden*, 273.

2. Trustees of the "Second Universalist Society" &c., sign note, and claim that the society only was held. *Ib.*

3. **PATENT RIGHT**, consideration of note given for. *See* MORTGAGE 2, 3, and p. 329.

4. Purchaser of, before due, when not put on inquiry. 329.

5. **LOST NOTE.** The payee of a lost note which is negotiable and payable to him or bearer, *cannot sustain an action at law* to recover the amount. A court of equity alone can give relief. *Adams v. Edwards*, 353.

6. Due ward from his trustee not affected by Statute of Limitations. *See* TRUSTEE 9 and p. 383.

NON-PROTEST, not evidence of fraudulent alteration, but rather of waiver of protest. 409.

8. SET-OFF. The maker of a note, transferred after it is due, sued in the name of the transferee, cannot *plead in offset* a matter which existed between him and the payee at the time of the transfer, although he can, *payment*, or, any defence, which grew out of the note transaction. *Armstrong v. Noble*, 428.

9. MARRIED WOMAN'S NOTE given for money to improve her separate real estate, and after death of husband a written promise to pay the same, held a sufficient consideration. 506.

10. OVERDUE, PRESUMPTION. It is not presumed in law that an overdue note uncanceled in the hands of the payee was paid when it fell due ; and the production of such notes and the mortgage securing them, in court, and proof of their due execution, establish *prima facie* the existence of indebtedness. *Hamblet v. Bliss*, 535.

11. GIFT. No consideration for promissory note intended as gift. *See* GIFT and p. 73.

BONDS, government deposited in bank for safe keeping ; liability of bank, if bonds stolen. *See* BANK 1 and p. 154.

BOND, constable's, not sealed, no vacancy in his office, when. *See* CONSTABLE 3 and p. 446.

BOND, probate, error in. *See* PROBATE COURT 3 and p. 434.

BOND. *See* INJUNCTION.

BONDHOLDERS. *See* RAILROAD.

1. BOOKS, non-production of, on trial, effect of, not prejudicial, if books were not called for. 154.

2. BOOKS, court refused opposite party to inspect, on trial, under the circumstances of that case. 409.

1. BOOK ACCOUNT, when it will lie, explained, &c. 347.

2. A part of the plaintiff's account was payment of a note, and so destroyed the jurisdiction of the County Court. 466.

BRIDGE, injury on. *See* HIGHWAY and p. 77.

BURDEN OF PROOF, on owner of cattle to prove agister negligent. 69.

“ “ on party claiming debt discharged in bankruptcy to prove creditor's name on schedule. 300.

BURDEN OF PROOF, on an insurer to show that certain articles were within the clause excluding "gin" &c. 148.

CAPACITY, MENTAL. *See* **CONTRACT** 7 and p. 278.

CASE, ACTION ON.

An action will lie in favor of a railroad company against one who has maliciously caused the arrest of its engineer for the sole purpose of delaying its train, and thereby injuring the company. *Railroad Co. v. Hunt*, 570.

CASES LIMITED. *State v. Meader*, 54 Vt. 126. 428.

CASES OVERRULED. *Hard v. Vt. & Ca. R. R. Co.*, 32 Vt. 473. 89.

1. **CERTIFICATES.** In cases appealed from the Probate to the County Court the practice is to send down a certificate. 388.

2. **CERTIFICATES** of dividends on preferred stock. *See* **RAILROAD** 5 and p. 110.

3. Whether school teacher had a legal certificate. *See* **SCHOOL** 3 and p. 61.

1. **CERTIORARI**, writ of, issued, and justice proceedings quashed, where respondent was not allowed an appeal for neglecting to procure bail. *See* **CRIM. LAW** 1. 1.

2. When it will issue. 3.

CESTUI QUE TRUST fund left with a trustee to be paid at his discretion, when *cestui* shall "prove himself worthy," &c. *See* **WILL** 1 and p. 243. *See* **CHANCERY**; **TRUSTEES**.

CHANCELLOR, power to grant rehearing in cause remanded from Supreme Court. *See* **CHANCERY** 45 and p. 578.

CHANCERY.

1. **MISLED, CARELESSNESS.** If one is misinformed and misled, and hence injured through his own carelessness, there is no ground for equitable relief; thus, the orator, having given a mortgage on certain lands to the defendant to secure his debt, failed to pay the same, and the defendant brought an action of ejectment, obtained a judgment, and the court allowed the orator time to redeem, ordering the last installment to be paid May 1st, 1881. *Held*, that a bill alleging that the orator was misled and misinformed as to the time when the installment became due without alleging, or proving, how or by whom he was misled, and praying that the defendant be ordered to accept the amount of the install-

ment in satisfaction of his judgment, should be dismissed. *Francis v. Parks*, 80.

2. **MISTAKE.** No relief for one who has signed a mortgage ignorant through his own negligence, that there was a "running clause" in it. See **MORTGAGE** 13 and p. 423.

3. **TRUST. INNOCENT PURCHASERS. EQUITIES EQUAL, possession prevails** ; thus, the defendant, being one of the selectmen of the plaintiff town, and also one of the directors of a certain railroad then in process of construction, caused the land in contention to be appraised by the railroad commissioners as if to be taken for railroad purposes, and the appraisal being satisfactory to the owners, they conveyed the same by deed to the defendant, such conveyance being understood to be to the defendant for the town, and was paid for by a town order ; but no such trust appeared in the deed. Afterwards the defendant sold, and received pay therefor, the same land, to D. S. & Co., which company being an *innocent purchaser without notice*, went into possession, and made some improvements ; and the defendant agreed to execute a deed sometime in the future. A bill having been brought to compel the defendant to deed the land to the plaintiff, *held*, that the company and the plaintiff had *equal equities*,—both in effect innocent purchasers ; and in such a case that the court will not turn the party in possession out, and put another party in, with no better right or equity. *St. Johnsbury v. Merrill*, 165.

4. **PARTIES.** When the interest of said company was disclosed by the answer, it should have been cited in ; and when the parties neglected to, the court *sua sponte* should have done so ; but as the company has been treated on all sides as a party litigant, the court will so treat it ; and it will be bound by the decree. *Ib.*

5. **PUT ON INQUIRY.** The company was not put upon inquiry, because it saw the workmen of the town drawing sand and gravel from this land. *Ib.*

6. **RESULTING TRUST.** The equity of the orator is a resulting trust. The defendant bought the land for three hundred dollars, and sold it for the same. *Held*, that the orator is entitled to a decree for three hundred dollars, and interest ; that it is so, although the orator drew a large amount of gravel from the land before sold ; that the defendant has no offset, and could make no gain to himself ; and the result is the same, though the defendant received as pay an award for land damages against said railroad, and it became worthless by reason of his neglecting to collect it for several years when he could have done so. *Ib.*

7. **CROSS-BILL.** D. S. & Co. not having filed a cross-bill, cannot claim a transfer of title. *Ib.*

8. **MILL DAMS.** The act of 1869, "regulating mill and other dams," did not authorize the committee appointed by the County Court to make an order, in the first instance, directing the owner to lower his dam ; or one that would have that effect,—as to raise his head-gate. *Glover v McGaffey*, 171.

9. **MASTER.** The case was referred to a special master under the statute, R. L. s. 724 ; a report was made, exceptions taken, the case re-committed for further findings ; but before there were other proceedings the master died ; and the chancellor then overruled the exceptions, and, without noticing the order to recommit, rendered a decree. *Held*, error ; that there was nothing for the chancellor to act upon. *Randall v. Randall*, 214.

10. **Special masters, in the finding of facts, are substituted for the court ; and their findings, upon legal evidence, are conclusive. They are not required to embody in their report, or return with it, any of the evidence, unless required to do so in the order appointing them, any further than may be necessary to present the legal question. Ib.**

11. **MASTER. PRACTICE.** The master should have found whether the claim had been paid ; but instead of this he reported the evidence and referred the question to the court. The court dispose of the case as though the proofs had been taken under our former practice. *Durant v. Pratt*, 270.

12. **JURISDICTION.** A Court of Chancery has jurisdiction to fore-close a mortgage in whatever form it may exist,—as an equitable mortgage. *Ross v. Shurtleff*, 177.

SAME. LOST NOTE. A court of equity alone can give relief, in case of lost note. 352.

14. **SAME. TRUSTEE'S ACCOUNTING.** A Court of Chancery is the proper place for a trustee to settle his account. The trustee held three relations to the ward, that of debtor, guardian, and trustee under the deed. Having come into a court of equity each relation will be scrutinized and adjudged. *See TRUSTEE 9. Chamberlin v. Estey*, 383.

15. **MULTIFARIOUSNESS** must be objected to by demurrer. 177.

16. **ANSWER. TAKEN AS ADMITTED.** A fact charged to be within the knowledge of the defendant, and answer silent as to it, taken as admitted. 177.

17. **PARTY. JOINDER.** F. was properly joined as defendant, as the bill alleges that he had joined in bringing *audita querela* to vacate the levy of an execution, under which the orator claims title ; and this allegation is not denied by the answer. *Ross v. Shurtleff*, 177.

18. **CROSS-BILL. BILL IN THE NATURE OF A CROSS-BILL.** The introduction of a distinct and independent subject of controversy, not allowable. 241.

18. **SUBROGATION.** When purchaser of equity of redemption cannot be subrogated to the rights of mortgagee. *See* MORTGAGE 1, 2, 25, and p. 201.

20. **DOCTRINE** of subrogation stated. 329.

21. **ANSWER.** The question of whether one may be *subrogated* can be raised by *answer*. 329.

22. Railroad purchasing mortgage lands, if it redeems, may be subrogated. 210.

23. **MARSHALLING OF ASSETS REFUSED.** The partnership creditors of a railroad company, under our statute—R. L. s. 3443, will not be preferred to an individual creditor, who has levied on a locomotive, the execution having been issued on a judgment against the railroad for injuries caused by the negligence of its servants. *See* PARTNERSHIP ; and *Railroad Co. v. Bizby*, 235.

24. **SAME. INJUNCTION.** The court refused to enjoin proceedings where execution had been levied on locomotive, engine, &c. *Ib.*

25. **SAME. PARTY.** The court could not decree as to that portion of the property already sold on the execution to L., as he was not made a party. *Ib.*

26. **SAME. JURISDICTION.** And the court intimate that that would be wholly a matter of law. *Ib.* *See* PARTNERSHIP and p. 241.

27. **EXECUTION** may issue on the decree against one-third of the property owned by three partners. 242.

28. **COSTS.** Orators in a *cross-bill* entitled to. 242.

29. Orator failed on some of the issues, and was disallowed costs, in part. 171.

30. **TRUSTEE'S COSTS.** A trustee acting honestly, in his accounting in chancery, sometimes allowed attorney fees ; but neither party was allowed costs in this case. *Chamberlin v. Estey*, 378.

31. **PLEADING.** The bill is bad on demurrer ; because, there is no allegation that the debts of the estate had been paid ; or, that the trust estate was in the possession of the trustee, and it appearing that the testator's estate was unsettled in the Probate Court. *Bacon v. Bacon*, 243.

32. **ORE TENUS. MISJOINDER.** When a demurrer, alleging several causes, is sustained in some and overruled in others, a new cause may be assigned *ore tenus* ; thus, when want of equity and a misjoinder of one party are alleged, the misjoinder of other parties may be assigned orally. *Hastings v. Belden*, 273.

33. **ATTORNEY. MISJOINDER.** In a bill of equity to enjoin the prosecution of an action brought on a promissory note, the defendants, B. and L., were the attorneys in said action for defendant H., and were joined with him in this bill. *Held*, a misjoinder, as there was no claim that the attorneys acted fraudulently. *Ib.*

34. **STATUTE OF LIMITATIONS.** But the bill is not demurrable on the ground that it appears that the orators had a defence at law ; namely, the Statute of Limitations, as it is not a meritorious defence. *Ib.*

35. **REFORM NOTE.** The prayer of a bill to enjoin the collection of a note should be *to reform the note* according to the agreement of the parties, where the action has been brought against the signers personally, and the claim is that they acted as agents of a religious organization. The bill should have contained a direct allegation that the orators were liable upon the note. *Ib.*

Objection to the joinder of a party with no interest can be made only by such party, and not by one joined with him. *Ib.*

When a bill does not merely refer to but makes a certain writ a part of the bill itself, the writ will be used in aid of a defective statement. *Ib.*

36. **PRACTICE. CROSS-BILL. ANSWER.** A bill having been brought to foreclose the defendant's equity of redemption in certain premises, for an accounting of the profits and to have the defendants enjoined from prosecuting proceedings in insolvency ; the orator having offered in his bill to pay whatever should be adjudged due either of defendants ; the defendant wife having claimed that \$560 was due her from the orator, and set forth her claim by answer ; the court having found from the testimony in her favor ; *held*, that she was not entitled to active relief ; that she must seek her rights by *cross-bill*, or upon the injunction bond ; but that the bill be dismissed unless the orator pays, within some short time, the sum found due. *Haskin v. Haskin*, 263.

37. **LAND DAMAGES. RAILROAD ENJOINED unless it paid, &c.** The defendant, M. & C. R. R. Co. constructed its road across the land of

the oratrix, a married woman, without complying with the statute as to taking land for railroad purposes, without her consent, and without any action of hers that amounted to an estoppel. After the road was surveyed and located, but before the oratrix' land was taken, the M. & C. R. R. Co. was mortgaged to secure its bonds owned by the defendant, the Conn. & Pass. R. R. Co., and leased to the defendant, E. C. R. R. Co. The mortgage was foreclosed and the title established in the bondholders. A bill having been brought to enjoin the defendants from occupying the oratrix' land. *Held*, The defendants should be enjoined unless they pay the land damages. *Kendall & Wife v. Railroad Cos.*, 438.

38. **PARTIES. HUSBAND.** The husband was properly joined as orator ; also, the mortgagee and lessee, as defendants. *Ib.*

39. The claim is not stale, as demand was made within five, and suit brought within six years. The Statute of Limitations does not apply. *Ib.*

40. Act of 1872, No. 32, passed after the land was taken, and repealed before suit, does not affect the case. *Ib.*

41. **JURISDICTION.** A Court of Chancery has jurisdiction, as it is not certain that there is a plain, adequate and complete remedy at law. *Ib.*

42. **ESTOPPEL.** There was no element of an estoppel. The oratrix by word or conduct did not induce any action or mislead anybody, either mortgagee or lessee. The defendants appropriated her land without right ; she seasonably remonstrated, merely *allowing*, but not *inducing*, them to hold it, to perform as originally required by law. *Ib.*

Knapp v. McAuley, 39 Vt. 275, distinguished. *Ib.*

43. **DECREE. EFFECT OF.** No one barred or estopped but the parties or privies. 329.

44. **SAME.** By a decree of foreclosure the mortgagor and all claiming under him are concluded. 512.

45. **REHEARING. APPARENT ERROR.** A chancellor may rehear a cause remanded from the Supreme Court on petition for substantial errors apparent or manifest from the papers and pleadings, errors plainly resulting from inadvertance or oversight of an uncontroverted or settled fact, errors or mistakes such as it is evident the Supreme Court would correct upon suggestion before the cause was remanded. *Canerdy, Admr. v. Baker*, 578.

46. **REVIEW.** But in a cause remanded this remedy is in no sense applicable for the purpose of review. *Ib.*

47. **RULE.** Under the twenty-fourth rule in chancery an application for rehearing must be made and notice of it served upon the adverse party within twenty days from the rising of the court which pronounced the decree, (in this case the Supreme Court). *Ib.*

48. The petition was dismissed on the ground that the error alleged was not an error ; that nothing had been overlooked in the first decision. *Ib.*

See MORTGAGE ; PARTNERSHIP ; TRUSTEES ; WILL ; MARRIED WOMAN 6.

1. **CHANGE OF POSSESSION**, in case of gift, as a piano, such as the nature of the property admits of,—attached by donor's creditors. 407.

2. None required, when mortgagee, after condition broken, takes possession of the farm, cuts the crops, &c., although the mortgagor, his father, remains on the premises. *Hamblet v. Bliss*, 535.

See FRAUD ; ATTACHING CREDITORS ; ATTACHABLE ; EVIDENCE 35 ; MORTGAGE 23 ; GIFT.

1. **CHARGEABLE WITH KNOWLEDGE**, when agent's knowledge cannot be set-up as a defence to action by principal. *Kingsley v. Fitts*, 293.

2. *See* *Woodruff v. Lampson*, 352.

3. Stockholder to what extent chargeable with knowledge of the affairs of the corporation. 136.

1. **CHARGING OUT ILLEGAL EVIDENCE**, when the rule does not apply. 36.

2. The admitting and withdrawing by the court of evidence in support of plea in off-set to an action on a note transferred after due, which plea is an insufficient defence, does not fall within the rule announced in *State v. Meader*, 54 Vt. 126, that the error of admitting illegal evidence is not cured by charging it out of the case. *Armstrong v. Noble*, 428.

3. When the rule does apply. 299.

1. **CHARGE TO JURY.** In construing the charge it should be taken as a whole. *Fassett v. Roxbury*, 551.

2. The court intimating how it should rule on the plaintiff's evidence, namely, that it did not prove fraud in law, upon which the defendant declined to go to the jury on any disputed fact, a verdict was ordered for the plaintiff. *Held*, that the exceptions do not bring into contention the ruling intimated. *See* TRIAL 4 and p. 535.

See BANK 3 ; GIFT 3 ; INSURANCE ; CONTRACT 7, 19 ; RAILROAD 1, 3.

CHATTEL MORTGAGE. *See* MORTGAGE and p. 235.

CLAIMANT of intoxicating liquor, when not entitled to a trial by jury. 82.

COLLECTOR. *See* CONSTABLE.

COLLATERAL FACT. *See* EVIDENCE 11 and p. 22.

COMMISSIONER. *See* EXECUTORS AND ADMINISTRATORS ; HIGHWAY.

COMMITTEE. *See* SCHOOL.

COMITY. *See* CONFLICT OF LAW ; RECEIVER ; BANKRUPTCY.

COMPOSITION PROCEEDINGS. *See* BANKRUPTCY 6 and p. 300.

1. COMPROMISE. A doubtful right compromised, to be a good consideration for a promise, must upon reasonable grounds be honestly entertained. There must be a yielding of something by each party. *Bel- lows v. Sowles*, 391.

2. COMPROMISE, elements of, stated. 387.

CONDITION PRECEDENT, in life insurance policy, payment, &c. 107.

“ “ obtaining a license by foreign insurance company. 531.

“ “ not in will charging legacy on real estate, &c. 518.

CONDITION BROKEN, in mortgage rights of mortgagor. 265.

“ “ to give chattel mortgage. 285.

“ “ mortgagee in possession, owner, and no change of possession of crops necessary. 535.

CONDITION, FINANCIAL, false representation as to, by insurance company, vitiates policy. 526.

CONDITIONS OF FORFEITURE, strictly construed. 147.

CONDITIONAL SALE. *See* SALE.

1. CONFIRMATION. A guardian cannot confirm a deed made by his ward except by following the statute, obtain a license, &c. *Doty v. Hubbard*, 278.

2. The heirs did not confirm the deed by neglecting to act in the matter. *Ib.*

3. There could be no confirmation without a knowledge of the right to have the contract set aside. *Ib.*

CONFLICT OF LAW. A law valid where made is valid everywhere ; hence, the contract of a married woman, made in another State and valid there, is held valid here. *Holmes v. Reynolds*, 39.

1. **CONSIDERATION.** No consideration to a note executed by one, and intended, as a mere gift. 73.

2. Patent right note has, when. 329.

3. None, for vote of town to pay one injured on highway, no legal notice having been given, when. *See* CONTRACT 18 and p. 385.

4. Forbearance to sue, &c. 387.

5. Forbearance of opposition to probate of will. *See* CONTRACT 19 and p. 391.

6. None for promise to pay for bank stock sold on illegal tax warrant. 420.

7. A sufficient consideration for the written promise of widow to pay a note given while married. *See* MARRIED WOMAN 14 and p. 506.

8. A promise, "he would make it up to him," held under the facts (which see), without consideration. 307.

See RAILROAD 12.

CONSTABLE.

1. Only sheriff or constable can serve order of removal of pauper. 323.

2. Under the statute of 1869, every male citizen of the age of twenty-one years subject to taxation in a town and resident therein is a voter in the town meeting of such town ; and this is so although at "the annual assessment next preceding" he was a resident of another town, owning real estate in both towns, and assessed in both ; and is eligible to the office of constable. *Wilson v. Wheeler*, 446.

3. **BOND. VACANCY.** The fact that the instrument written in the form of a bond but not under seal, which one executed who had been elected constable, does not occasion a vacancy in the office. *Ib.*

4. That he was, and must be, "sworn." *See* EVIDENCE and p. 452.

5. **NEGLIGENCE OF.** A constable duly empowered by vote of a town to serve process throughout the State is under the same obligations as a sheriff, to legally serve a writ which he has received and agreed to serve, though the service is to be made beyond the limits of the town electing him ; and, on failure to make such service, he and the town are liable in damages. *Dix v. Batchelder and Town of Plainfield*. 552.

6. **FEES OF, *Prepayment waived when.*** If an officer receives a writ without objection in regard to the prepayment of his fees, the presumption arises that the fees were either tendered or paid, or their prepayment waived. *Ib.*

7. The constable accepted the writ and agreed to serve it ; but instead of that he gave it to a person, supposing him to be a deputy sheriff, which person, after pretending to make service returned it to the plaintiff's counsel, who entered it in court, but without knowledge of the defective service. This did not release the constable. *Ib.*

CONSTRUCTION, of insurance policy,—liberal in respect to insured, strict in respect to insurer. 148.

“ of officers returns,—a fairly liberal rule adopted. 402.

“ of will, intent to govern. 518.

“ of codicil. 317.

“ of statute. *See* STATUTE and pp. 414, 439.

“ of charge to jury, as a whole. 552.

“ of injunction. 460.

CONSTRUCTIVE NOTICE. *See* NOTICE.

1. **CONSTITUTIONAL.** An insolvent law discharging debt contracted before its passage is unconstitutional. 8.

2. The Legislature has power to pass laws regulating the business done in this State by foreign insurance companies. 531.

CONTINGENT CLAIM. *See* EXECUTORS AND ADMINISTRATORS.

CONTRACT.

1. B. having a contract with the government to furnish headstones for soldiers' graves, and, being indebted to both the plaintiff and defendant, ordered all checks due for his work to be made payable to the defendant, and directed the defendant to first pay a \$1,000 note which it held against him, and then to pay the plaintiff. The check came payable to B. He carried it to the bank, and by his agreement it was applied on what he owed the bank and C. *Held*, that the plaintiff could not recover ; as the defendant never had control of the check, or its proceeds. *Page v. B. N. Bank*, 51.

2. **SCHOOL COMMITTEE** may recover for teacher's board, if no fraud, &c. 43.

3. **CONTRACT TO SELL LAND**, reserving standing timber till paid for ; timber belongs to grantor, and, if he conveys his interest, to his grantee. *Dickerman v. Ray*, 65.

4. As to verbal sale of realty. *See* STATUTE OF FRAUDS and p. 36.
5. HUSBAND'S contract while acting as the agent of his wife. *See* MARRIED WOMAN 6 and p. 253.
6. IMPLIED PROMISE. The plaintiff and defendant were partners in the hotel business. She, and her two daughters, who were more than twenty-one years old and members of her family but not dependent upon her for support, lived in a cottage near by and took their meals at the hotel ; also her son boarded there for a few weeks. The auditors having found that there was no express promise to pay, and reported no facts that raise an implied promise, it was held that she was not chargeable with their board. *Hawkins v. Hyde*, 55.
7. MENTAL CAPACITY. ACQUIRED BY EDUCATION. In an action of ejectment the question being whether the defendant's grantor had the requisite *mental capacity* to deed, the court instructed the jury : " Whether she had *native* business capacity enough to understand it, or whether she learned from competent sources what would be for her interest, if she got the *capacity by education* at the time . . . that would be enough." " If she had competent advice from others, so that by their explanation she was made to understand," &c. *Held*, no error. *Doty v. Hubbard*, 278.
8. PRESUMPTION OF BUSINESS CAPACITY. The deed was executed on the second day of January, the application to the Probate Court was made on the same day for the appointment of a guardian, and he was appointed on the thirtieth of the same month. *Held*, that the plaintiff was not entitled to a charge that the presumption in favor of business capacity was changed. *Ib*.
9. CONFIRMATION. A guardian cannot *confirm a deed* made by his ward except by following the regulations prescribed by the statute, obtain a license, and execute a conveyance himself. *Ib*.
10. The heirs did not confirm the deed by neglecting to act in the matter. *Ib*.
11. There could be no confirmation without a knowledge of the right to have the contract set aside. *Ib*.
12. CONSIDERATION, RELATE BACK. OFFER. C., H. and S. owning the stock of a corporation, on the first of January C. and H. offered to transfer theirs and their interest in the concern to S. if he would release them from all its liabilities, he having some time to consider the matter, and till the first of March to release them. On January 19th he accepted the offer. The company owed C., and he being treasurer and in due course collected \$266.80, and applied it on his account. The transaction

was fair and open ; proper entries were made on the books. S. did not know of the collection when he accepted the offer ; but might have known it ; and the referee found that " they all knew that the business had been prosecuted during the time, and that changes in the assets would occur." Before the first of March S. learned of the collection ; and, on finding fault, C. told him that " he would make it up to him." *Held*, that the contract did not relate back to the time of the offer ; and that there was no consideration for the promise. *Clay v. Severance*, 300.

13. **ACCEPTANCE OF GOODS NOT ORDERED. DAMAGES. RECOURP-
MENT.** The contract was made by letters. The defendant supposed he had ordered a cider press with counter-shaft attachment ; but when it came he found it was a press with power attachment with chain-belt. He knew what he had received, and that the price was \$28 more than that of the other. It being late in the season, and his customers pressing him to do their work, the defendant set up and used the press. The plaintiff, supposing the order to call for the machine which he had sent, gave wrong directions as to the timbers needed in setting it up, and injury resulted in consequence to the defendant. The defendant wrote asking the plaintiff if he could ship the press "at once" ; and the plaintiff replied that he could, "on short notice." In a few days thereafter, September 4, 1880, the defendant ordered it to be shipped "immediately." September 13th, he wrote again, saying that he had heard nothing from his order ; and September 15th the plaintiff replied that the press would be shipped "that day or the next." It was not shipped so as to be received until September 30th, 1880. In an action of assumpsit to recover the price, *held*, that by setting up and using the press the defendant accepted it. *Dennis v. Stoughton*, 371.

14. That all the facts show that both parties contemplated an immediate fulfillment of the order to ship the press. *Ib.*

15. **CUSTOM.** That the plaintiff is liable for all damages resulting directly and naturally from his delay in performing the contract, and for his erroneous directions as to using the timbers in setting up the press,—and, hence, is liable for loss incurred in changing the timbers, loss of time of workmen, and loss on stock ; but not for the loss of *custom*, it being too indirect and remote. *Ib.*

16. That, the case having been referred, the pleadings could be amended so as to embrace a plea of set-off, if necessary ; but the defendant may show in *recoupment*, or, reduction of the damages, such damages as he has sustained by a breach of the contract. *Ib.*

17. **REASONABLE** time to perform a contract, when no time is fixed. *Ib.*

18. **VOTE OF TOWN. NO CONSIDERATION.** In an action of assumpsit based on a vote of the town, where the plaintiff offered to prove that he was injured while travelling on the highway through its insufficiency; that he gave notice of his injuries, in proper form, within *thirty* days, instead of *twenty*; that he was misled respecting the time within which such notice should be given by information given him, on which he relied, by *one* of the selectmen of the town; that at a legally warned meeting of the voters of the town, the plaintiff presented his claim for damages, insisting that the defendant could not take advantage of the defect in the notice, and that thereupon the town voted to pay him \$200; which offer of evidence was rejected by the court below, and a verdict ordered for the defendant. *Held*, that defendant was not responsible for the misinformation given by *one* of its selectmen; that the vote was not a compromise, as there was no mutual yielding of opposing claims; and no consideration for the vote. *Gregg v. Weathersfield*, 385.

19. **COMPROMISE. CONSIDERATION. FORBEARANCE OF OPPOSITION TO PROBATE OF WILL.** The plaintiff was heir-at-law of the defendant's testator, but received nothing under the will. The defendant was executor, and his wife and daughter legatees. The plaintiff claimed that he had determined to contest the will on the ground that it had been obtained by undue influence, that he had given notice of his intention to the Probate Court, that he had employed counsel, and had been advised by him to make opposition; that this was known to the defendant; that the defendant promised to pay the plaintiff \$5,000 if he would desist in such opposition; that the plaintiff, in consideration of such promise, did forbear; and that the will was approved without delay. *Held*, in an action to recover the five thousand dollars, that the plaintiff was neither bound to allege, nor prove, that undue influence had been used to procure the making of the will. *Bellows v. Sowles*, 391.

20. But the consideration was sufficient if he was able to show that he honestly thought *he had good and reasonable ground* for making the claim that the will, so far as related to him, was the production of undue influence, and for that reason he *honestly and in good faith intended* to oppose its establishment. *Ib.*

21. A doubtful right compromised, to be a good consideration for a promise, must upon reasonable grounds be honestly entertained. There must be a yielding of something by each party. *Ib.*

22. **ILLEGAL, CONTRACT** prohibited by statute, as that of foreign insurance company, without complying with the statute. 533.

23. *Nudum pactum.* See BANK 9; TAX 1 and p. 420.

24. IMPLIED, *See Armstrong v. Noble*, p. 431 ;

“ to repay usury ; hence, one may plead in set-off to claim for, 417 ;

“ none, that the purchaser of an equity of redemption will pay off the mortgages. 205.

25. THIRD PARTY. Doubted whether the purchaser of an equity, could insist, in a foreclosure proceeding, brought by the assignee of the mortgage, on the conditions of a contract made by the mortgagor and mortgagee. 513.

CONTRIBUTORY NEGLIGENCE. *See NEGLIGENCE ; HIGHWAY.*

COSTS.

1. Costs cannot be taxed against a respondent for witnesses summoned against him before the twenty-four hours allowed him by statute to plead have expired. *State v. Nichols*, 211.

2. Orator in cross-bill allowed costs. 242.

3. Orator failed on some of the issues, and was disallowed costs, in part. 171.

4. Attorney fees and other costs disallowed a trustee in accounting in chancery, as he did not act in good faith. 378.

5. Attorney fees, when not allowed in action on injunction bond. What other costs are not allowed in such action. *See INJUNCTION* 12 and p. 470.

6. TENDER of amends by defendant, he entitled to costs, &c., 378. *See CHANCERY ; DEPOSITION.*

COURT, COUNTY.

1. JURISDICTION. The amount of the plaintiff's specification exceeded two hundred dollars, and evidence tended to support the whole ; but the court found that they were entitled to recover less than two hundred dollars, because some of the items should have been charged to another party. This was the issue on the trial. There was no evidence of good faith in bringing the suit to the County Court, but the court found that “ there was no bad faith in the matter on the part of the plaintiffs, but they were misled by the negligent manner in which their books had been kept ” by their bookkeeper. *Held*, that the court had jurisdiction ; that the presumption is that they acted in good faith ; and the rule that the knowledge of an agent is imputable to the principal has no application to this case. *Woodruff v. Lampson*, 350.

2. To allow appeal from the Probate Court, under the fraud, accident and mistake statute, when. 434.

3. In an action of book account an account of materials delivered in payment of a note, and accepted in payment, thereby extinguishing the note, cannot be used to increase the debtor side of the plaintiff's book beyond \$200 so as to give the County Court jurisdiction, although the suit is brought in good faith to that court. *Abbott v. Chase*, 466.

4. To establish a highway by commissioners, which highway extends into two adjoining towns, although no application had been made to the selectmen. 490.

5. APPEAL, can allow under the fraud, accident and mistake statute, if the court think the party pleaded in good faith an offset of over \$20, though the justice held that he did not plead in good faith. *Wilber v. Gilman*, 503.

6. PRACTICE. If it is claimed that there was no evidence to support the finding of the jury, the question should be presented in the County Court and before judgment on the verdict. *Brownell v. Railroad Co.*, 218.

7. DISCRETION OF. To allow pleas to be filed out of time. 36.

“ “ “ appeal from Probate Court, when. 434.

“ “ “ offences specified to be proved for selling liquor, by other witnesses than those named in specification. 57.

“ “ But not to allow party to impeach his own witness. 24.

8. Cannot recommit case to a referee after hearing, and pending on exceptions in Supreme Court. *Clay v. Severance*, 307. See TRIAL ; PRACTICE ; EVIDENCE.

CREDITORS ATTACHING. See ATTACHABLE ; ATTACHMENT ; FRAUD ; SALE 6 ; EVIDENCE 34 ; GIFT.

CREDITORS FOREIGN not affected by discharge, when. See BANKRUPTCY and p. 187.

CREDITORS. PARTNERSHIP AND INDIVIDUAL, when former not preferred. 235.

CROSSING, RAILROAD, when railroad company liable for defect in. See HIGHWAY 9 ; RAILROAD 22 and p. 484.

CRIMINAL LAW.

1. **APPEAL. BAIL.** A respondent in a criminal trial is entitled to an appeal to the County Court from the judgment of a justice of the peace, if claimed within two hours, although he neglects to procure the bail demanded for his appearance. In re *Kennedy*, 1.

2. In such a case the appeal should be granted, and the respondent held in custody for his appearance at court. *Ib.*

3. The writ of *certiorari* will be issued on petition, and lie to bring before the Supreme Court for review the record of a justice of the peace in a criminal case, when the justice has refused an appeal demanded within two hours, on the ground that the respondent neglected to procure bail, and the justice proceedings quashed. *Ib.*

4. A respondent imprisoned under the same circumstances was discharged on writ of *habeas corpus*. *Ib.*

5. **JURY** referred to in Bill of Rights,—*twelve men*. *Ib.*

6. **TRIAL BY JURY.** Claimant of intoxicating liquor not entitled to. **STATE v. INTOX. LIQUOR, SMITH, claimant**, 82.

7. **COSTS** not taxable before statutory time for pleading. 211.

8. **TIME TO PLEAD**,—twenty-four hours, &c. 211.

9. **SPECIFICATION** to be furnished respondent. 211.

10. **CONFESSION. INDUCEMENTS.** The sheriff and state's attorney talked with the respondent while in jail. The sheriff first testified that no inducements to confess were held out, but afterwards said "that he presumed he and the state's attorney both told the respondent it would be better for her to tell the whole story, and the punishment would be likely to be lighter." *Held*, that his testimony was not admissible. *State v. Day*, 510.

11. When there is no conflicting testimony as to what the inducement was, the decision of the court below may be revised by the Supreme Court. *Ib.*

12. **AMENDMENT. PLEADING. MISNOMER. LIQUOR LAW.** The state's attorney filed an information under the liquor law against the respondent, as "Thomas J.," for maintaining a nuisance. The respondent pleaded in abatement that his name was "Timothy J." *Held*, that the information was amendable, as not a matter of substance. *State v. Murphy*, 547.

13. **TIME, ALLEGATION OF. SCILICET.** An information alleging the offence to have been committed, "heretofore, to wit, on the 17th day of September, A. D. 1881", is sufficient, on motion in arrest of judgment. *Id.*

14. **SURPLUSAGE, PLEADING.** The Revised Laws took effect August 1st, 1881; this complaint was dated September 15th, 1881, charging "an offence against the provisions of chapter ninety-four of the General Statutes,"—the furnishing of intoxicating liquor, &c. The respondent moved to quash; the state's attorney, to amend by erasing the words, "of chapter ninety-four," and the word, "*general*." *Held*, as there was a statute in force at the date of the complaint making the doing of the act, with which the respondent was charged, an offence, that the italicised words did not vitiate the complaint, but should be treated as surplusage. *State v. Dewey*. 550.

CROSS-BILL, *See* CHANCERY.

CULVERT, *See* RAILROAD 1, 2.

CUSTOM, loss of, *see* CONTRACT 15.

DAMAGES.

1. **NATURAL CONSEQUENCE.** In an action for false imprisonment, where the only claim against the officer was, that the plaintiff was imprisoned in another county than where he was arrested, testimony as to the miscarriage of the wife and the expense of doctoring her claimed to have been caused by her husband's arrest,—is not admissible. *Ellis v. Cleveland*, 358.

2. **MITIGATION.** In action of trover by the vendor of property sold conditionally, against one ignorant of the lien, who purchased of the conditional vendee, evidence was not admissible in mitigation of damages to show that the identical bank bills paid for the cattle were sent to the plaintiff, he being ignorant of the sale; and the defendant was liable for the full value of the cattle. *See* TROVER 4. *Morgan v. Kidder & Robinson*, 367.

3. **Damages for not furnishing machinery as agreed, &c.,—loss of time of workmen, loss on stock, erroneous directions as to the timbers to be used in setting up the press, &c.** *See* CONTRACT 13, 16, and p. 371.

4. **RECOUPMENT, &c. CUSTOM WORK, loss of, &c.** *Id.*

5. **No damage on resurvey of highway.** 412.

6. **LAND DAMAGES.** *See* CHANCERY and p. 438.

7. Either the report or exceptions thereto must show that the rule adopted for computing the damages was not the true one, or the judgment below will not be reversed. *See* INJUNCTION 470.

8. RAILROAD. FELLOW SERVANTS. A railroad company is liable in an action on behalf of its fireman killed by the washing out of a culvert, the culvert being in an improper condition resulting from the negligence and carelessness of its bridge builder and road-master. *Davis v. Railroad Co.*, 84.

9. RAILROAD CROSSING, company liable for injuries to traveller, resulting from negligent construction of. *See* RAILROAD 22 and p. 484.

10. PROXIMATE AND REMOTE damages, question discussed. 570.

11. MALICIOUS ARREST of railroad engineer, to delay train, and thereby injure the company ;—action will lie in favor of railroad. 570. *See* INJUNCTION ; HIGHWAY ; RAILROAD.

DATE OF WRIT, *prima facie* evidence, that it issued at its date. 354.

DEBT, ACTION OF. *See* EXECUTORS AND ADMINISTRATORS.

DEED.

1. Absolute in form may be a mortgage. 265.

2. Mental capacity sufficient to deed, &c. *See* CONTRACT and p. 278.

3. Ward's deed cannot be confirmed by guardian, excepting, *Ib.*

4. "LAND ADJOINING." ISLAND. A deed conveying a hotel does not convey, by force of the words, "*and lands adjoining it, being two or three acres, more or less,*" a small island in a river back of the land on which the hotel stands. *Miller v. Mann*, 475.

5. ON A STREAM. One of the defendant's grantors, owning the land on both sides of the river opposite the island in question, deeded that parcel "on the westerly side of the" river. The main channel was on the easterly side of the island. *Held*, that the deed included all the land to the thread of the main channel, and, therefore, the island. *Ib.*

6. DESCRIPTION. UNCERTAINTY. The description in a deed, commencing at a certain point on the river and only running around three sides of a piece of land to another point on the same river, closed with these words : "*meaning to convey all the land east of the said mentioned bounds that I own.*" The land was on the west side of the river, and the grantor owned to the river. *Held*, that the deed was not void for uncertainty. *Ib.*

7. **MISTAKE IN RECORDING.** When there is a mistake in recording a deed, the record, and not the deed, governs, and determines the equities of subsequent purchasers. *See* MORTGAGE 18. *Potter v. Dooley*, 512.

8. **FILING** the deed in the town clerk's office is only the *incipient record*. *Ib.*

9. Such a record is not constructive notice. *Ib.*

DEED OF TRUST. *See* TRUSTEES.

DEMAND. *See* SALE 7.

DEMURRER. *See* PLEADING; CHANCERY.

DEPOSITION. The citation was served on the plaintiff at Rutland on the 4th, to appear at New York City on the 8th, to be present at the taking of a deposition to be used in the County Court, which was to commence on the 12th, all of the same month. The deposition was taken by another notary than the one named in the citation. Costs not allowed. *Phillips v. Post and Reynolds*, 568. *See* REFERENCE 2; EVIDENCE 17.

DEPOSIT of bonds for safe keeping with bank. *See* BANK AND p. 154.

DERIVATIVE SETTLEMENT. *See* PAUPER 7.

DEVISE. *See* WILL.

DESCRIPTION. *See* DEED 6; CHATTEL MORTGAGE 3; MORTGAGE 12,—petition to foreclose.

DIRECTOR, of railroad. *See* CHANCERY 3.

DISCLAIMER. *See* EJECTMENT 2.

DISCRETION, court has not, to allow party to impeach his own witnesses. 24.

“ Has, to allow pleas to be filed out of time. 36.

“ Also, offenses specified to be proved, for selling liquor, by other witnesses than those named in specification. 57.

“ To allow appeal from Probate Court when. 434.

“ of trustee as to payment to *cestui*, when controlled by court. 243.

DIVIDEND. *See* RAILROAD and p. 116.

DIVISION FENCE. *See* FENCE and p. 60.

DOGS are rateable estate under the act of 1862. 545.

EARNINGS of married women. *See* **MARRIED WOMEN** 9 and p. 362.

ELIGIBLE. *See* **SCHOOL** ; **CONSTABLE.**

1. **EJECTMENT.** On motion of defendant the cause was remanded to file a declaration for betterments under the statute. 58.

2. The plaintiff granted to the defendants, R. and P., the right for fifty years to dig and remove all ores and minerals found on his farm, and was to receive an annual rent and a royalty. Within one year R. conveyed his interest to P. The plaintiff had continuous possession. R. did not claim title or possession. P. was defaulted ; R. disclaimed. *Held*, that ejectment would not lie, and that R. was entitled to his costs. *Phillips v. Post and Reynolds*, 568.

EMINENT DOMAIN. *See* **RAILROAD** 17 and p. 210.

EQUITABLE MORTGAGE forelosed. 177.

EQUITABLE RIGHTS of one in possession of realty under parol agreement to purchase. 269.

EQUITY OF REDEMPTION, levied on. 177.

EQUITY OF REDEMPTION, purchaser of. *See* **MORTGAGE** ; **CHANCERY.**

EQUITIES EQUAL, possession prevails. 165.

EQUITIES EQUAL, partnership creditor not preferred to individual. 241.

ESCROW. *See* **DEED** and p. 517.

ESTATES, settlement of. *See* **EXECUTORS AND ADMINISTRATORS.**

ESTOPPEL.

1. No one is barred, or estopped, by a judgment, except the parties or their privies. *Gerrish v. Bragg*, 329.

2. The orator having brought a bill to foreclose his mortgage, the defendant, J. J. P., owning a prior mortgage securing two notes, one for \$100, and the other for \$1400, is not *estopped* from proving the true amount of his mortgage, by reason of having testified on the question of alimony in a divorce case in which he was a party, that his mortgage amounted to only \$100, although the orator was his attorney at that time, and relying on the truth of the testimony, advanced money, and took his mortgage ; and this, on the ground that the orator was not the party making the inquiries, and that the defendant had a right to know what was the object of the inquiry, and that his answer would be relied on ; and this he could not have known. *Durant v. Pratt*, 270.

3. A decree binds parties and all claiming under them. *Potter v. Dooley*, 516.

4. An attachment of property sold conditionally by the lienholder is not an estoppel so but that he may abandon the attachment and hold by his lien. *Mathews v. Lucia*, 308.

5. A railroad company was estopped by its actions from denying the validity of certificates of dividends. See RAILROAD 10 and p. 134.

6. LAND DAMAGES. There was no element of an estoppel. The oratrix by word or conduct did not induce any action or mislead anybody, either mortgagee or lessee. The defendants appropriated her land without right; she seasonably remonstrated, merely *allowing*, but not *inducing*, them to hold it, to perform as originally required by law. *Kimball & Wife v. Railroad Co.*, 438.

7. The plaintiff filed what he called a "replication in estoppel;" not sustained. 37. See INSURANCE.

EVIDENCE.

1. CHARGING OUT WHEN IMPROPERLY ADMITTED. See CHARGING OUT.

2. QUADRENNIAL GRAND LIST was admissible in evidence in an action against a constable for selling property for taxes. *Wilson v Wheeler*, 446.

3. Copies of the warning and proceedings of the town meeting are admissible to prove the election of constable and listers, and that they were sworn. *Ib.*

4. SWORN. The only record evidence offered to establish the fact of the defendant having been sworn was a copy of the record of his election, in which the word "sworn" appeared immediately after his name. *Held*, sufficient proof that he was sworn as the law requires. Parol evidence was also admissible to prove it. *Ib.*

5. GRAND LIST. One cannot stand on tax title when the grand list was not offered in evidence. 512.

6. RECORD. A recognizance cannot be contradicted. 47.

7. RECEIPT *prima facie* evidence. 224.

8. RETURN. When an officer is a party justifying under his official acts his return is evidence; but where the return only shows that a *list of the property* was indorsed, it was properly excluded. 400.

9. DATE OF WRIT, *prima facie* evidence that it issued at its date. 354.
10. SEARCH WARRANT, not admissible unless pleaded. See TRESPASS 2 and p. 259.
11. COLLATERAL FACT. BOUND BY WITNESS' ANSWER. The plaintiff's store while occupied by the defendant was burned. The question being whether burned by the defendant, and one of the plaintiff's witnesses (who was the defendant's clerk, and who, the defendant claimed, set the fire) having admitted on cross-examination that he told a certain party that he had been offered \$100 to burn a building, it not appearing what building, it was held that the defendant was bound by the answer ; that he could not inquire of the witness if it was true that such offer had been made ; nor prove that he refused to work for him the day after the fire. *Lewis v. Barker*, 21.
12. As bearing on the question, when payment was to be made, whether before or after the wood was all delivered, it is competent to show that the vendor was financially involved at the time the contract was made. *Beckley v. Jarvis*, 348.
13. IRRELEVANT, EFFECT OF, judgment not reversed for, if harmless. *Ib.*
14. HARMLESS, not reversed for. 409.
15. CHARACTER. *Proof in support of.* In an action on a policy of insurance where the defendant's evidence tended to show that the plaintiff burned his own building, and that he had committed perjury in his proof of loss, evidence of the plaintiff's good character was admissible. *Mosley v. Vi. M. F. Ins. Co.*, 142.
16. CANNOT IMPEACH HIS OWN WITNESS. A party cannot impeach his own witness ; and *it is not in the discretion of the court* to allow him to do so, either by general evidence, or by proof by other witnesses of prior contradictory statements. *Cox v. Eayres*, 24.
17. When a deposition was excluded on the ground that the witness was in court, and the witness was then called, and on cross-examination testified that the plaintiff about the time of the taking of the deposition had given him a pair of shoes, and intoxicating liquor, it was held that the plaintiff could *repel the imputation cast upon him*, but that he could not show that the witness had made prior contradictory statements. *Ib.*
18. WITNESS DRUNK. Proof that a witness was drunk at the time of the event to which he testifies may be introduced to discredit him. *Ib.*
19. WITNESS DUMB. Evidence admissible. See *Quinn v. Halbert*, 224.

20. **FRAUD.** It was claimed that the defendant's motive in burning the building was to get the over-insurance on his goods. He had some commission goods which were not destroyed by the fire, but which he fraudulently attempted to induce the insurance company to pay for. A postal card written by the defendant to the owner of such goods, stating that they had been burned, and that the company refused payment, was admissible. *Lewis v. Barker*, 21.

21. **FRAUD, action against several, what one says not evidence against the others, when.** In action against several parties for fraud in the sale of an interest in two mines, what one of them said, some months after the sale, as to the dishonest character of the transaction, is *narrative*, and not *evidence*, against those who were not present. *Hall v. Jones*, 297.

22. The plaintiff having purchased of the defendants one twentieth of two mines, and the question being whether the sale was fraudulent, what one of them said to a third party who had bought a like interest in the same mines, at a different time, was not evidence against the others, not being present. *Ib.*

23. **SAME. NON-PROTEST** of note is not evidence of fraudulent alteration. 409.

24. **BURDEN OF PROOF**, on owner of cattle to show agister negligent. See **INSURANCE** 18 and p. 69.

25. **BURDEN OF PROOF** on party claiming debt discharged in bankruptcy to prove creditor's name on schedule. 300.

26. **TOO REMOTE. WAGES.** The contention being as to what wages a carpenter was to receive per day; *held*, that evidence of what other carpenters received in other towns in another State, was too remote. *Noyes v. Fitzgerald*, 49.

27. **SAME.** Evidence showing that other depositors of bonds in this bank had been misused, or wronged by the cashier, is not admissible to prove that the plaintiff was. *Whitney v. National Bank*, 154.

28. **SAME.** In action for false imprisonment, evidence as to miscarriage of wife, &c., too remote, not proximate consequence. See **DAMAGE** 1 and p. 358.

29. **ONE PARTY DECEASED.** In an action of ejectment where both the plaintiff and defendant claim to have derived their interest in the premises in question from the same party, (now deceased), the one as heir, and the other by contract, the defendant, under our statute, is not a witness in his own behalf, to prove that such party agreed by parol to deed the premises to him on his paying \$150, and that he paid it; as this was the contract "in issue and on trial." *Pember v. Congdon*, 58.

30. **SAME.** The plaintiff having deceased, his administrator having entered to prosecute the suit, and on the hearing before a referee, the testimony which the plaintiff had given on a former trial having been reproduced by witnesses who testified from "recollection solely," the defendant is not a witness in his own behalf as to what the deceased party testified to, or, as to the reproduced testimony. The testimony was not "taken in writing or by a stenographer." *Blair v Ellsworth*, 415.

31. **IN REBUTTAL. AGENT.** On cross-examination one of the plaintiff's witnesses testified that he with another man, at the request of the defendant's wood-agent, went to see the plaintiff, to ascertain what he would settle his claim for, and reported his terms to said agent. The agent was then called and denied the conversation, and also said that he had no authority to request any one to see the plaintiff; and, on cross-examination, that he did not assume such authority. The plaintiff was then allowed to show that at said interview the wood-agent gave them to understand that he represented the defendant. *Held*, no error. *Brownell v. Railroad Co.*, 218.

32. **SAME. HARMLESS.** The president of the trust company was properly allowed to state, in rebuttal, that he would not have discounted said note without the endorsement of the plaintiff; but, if not, it was harmless to defendant, and not vitiating error. *Brainerd v. Draper*, 409.

33. **MORE PROBABLE, evidence to show, &c.** When the maker of such note claims that he boarded the payee's wife, and that the payee, before the transfer, agreed the boarding should be a payment on the note, the fact that he did board renders the agreement more probable, and is, therefore, evidence. *Armstrong v. Noble*, 428; *see*, also, p. 223.

34. **AGENCY. FRAUD.** The property in dispute having been purchased by D. of the assignee of his own insolvent estate, the question being whether the plaintiff or D., the execution debtor, was the owner, and this turning on the question whether D. bought it for himself or as the plaintiff's agent, the assignee and his attorney were witnesses, and what D. at the time of the sale did, or said, or failed to say, as to his agency, was evidence in chief. *Quinn v. Halbert*, 224.

35. **CHANGE OF POSSESSION. FRAUD.** Also, all the actings and doings of the parties with the property, both before and after it was replevied, and its avails, are admissible as evidence, the goods being in the possession of the former owner, and it being claimed that the sale to the plaintiff was fraudulent as to creditors,—that it was a sale to D. personally, and not as the agent of the plaintiff. *Ib.*

36. After the purchase of the goods the plaintiff furnished D. three hundred dollars, which were used to buy new goods to keep up the stock.

In about a month D. paid the plaintiff three hundred and fifty dollars and took this writing: "Received of Wm. Doran three hundred and fifty dollars cash, *loaned* to purchase goods." The plaintiff claimed that a part of the goods purchased with this money was included in his attachment. *Held*, that the receipt was *prima facie* evidence that the money was *loaned*. *Ib.*

37. CUSTOM. It was material to distinguish between the goods first purchased by D. of the assignee and what was subsequently bought in market to keep up the stock. The testimony of the parties who inventoried the goods after the attachment, who had long experience in the same branch of trade, as to particular marks and figures on the bills, which were in accord with the *general custom* of the trade, by which they identified certain goods of the last lot, was admissible. *Ib.*

38. PAROL, to prove deed absolute in form is a mortgage. 265.

39. PAROL. One of the plaintiff's charges was for the use of a sugar lot. This lot was not included in the written lease of the farm. Parol evidence was admissible to prove that the plaintiff, just before the contract was executed, told the defendant, as an inducement to make the contract, that he could have the use of the sugar place with the farm. *Proctor v. Wiley*, 344.

40. PAROL, that constable was sworn. 446.

41. NOTE OVERDUE, presumption that it is not paid, when presented uncanceled in court by the payee. 535.

42. PARTY'S SAYINGS. A party cannot introduce his own sayings as evidence in his own favor, as a rule; thus, in an action for false imprisonment, the question being whether the plaintiff consented to be imprisoned in another county than the one in which he was arrested, what he said to a third party, while in the custody of the officer, as to the cause of his arrest, and where he was to be taken, is not admissible. *Ellis v. Cleveland*, 358.

43. DIARY. MEMORANDUM. While the plaintiff was testifying in chief he referred to a pocket diary to refresh his recollection, and read some portion of it. On cross-examination the defendant offered the whole book to show that the witness had not been in the habit of keeping a diary. *Held*, that it was competent for the court to limit the use of the book to what had been read; as the witness did not claim to have kept a diary of *all current events*, but only what transpired on *one occasion*. *Brainerd v. Draper*, 409.

44. INJURIES RECEIVED ON HIGHWAY. In an action for injuries received while travelling on the highway, caused by a collision with a

runaway team whose driver had been thrown from the sled in consequence of a bad place in the road about fifty rods back of the place where the accident occurred, evidence that such team had the habit of running away is not admissible. *Cheney v. Ryegate*, 499.

45. MEMORANDA of measurements made at the time, confirmatory of the evidence given by the witnesses who made and produced them, are admissible. *Ib.*

46. IN REBUTTAL. The trial being in June, 1882, the accident having occurred in November, 1880, one witness testified that he "met a team there three or four years ago," that the "road was the same as at the time of the accident," that he "was going north and started a little down the hill and met a team and could not pass, and I backed back a little, and they passed"; another witness: "I think it was in 1877, width of road was the same, . . . I met a team. . . . They backed back; I met the team at the top of the hill. I don't think teams could pass on that hill." *Held*, admissible. *Ib.*

47. CONFESSION, INDUCEMENT. See CRIMINAL LAW 10.

48. PHYSICIAN. A physician was allowed to testify that he called on the plaintiff sometime after the injury, not professionally, but to transact business, and that he told him that "he had a great deal of pain in his head, and that his neck was hardly able to support his head, unless he could get where he could rest it upon his hand or some object forward of him." *Held*, that the testimony should be taken as though the witness was not a physician; but that it was admissible as referring to his then present condition. *Drew v. Sutton*, 536.

See LIBEL.

EXCEPTIONS.

1. When there is no exception to the report of a referee the court will not pass upon his ruling in regard to a deposition. 174.

2. Either the report, or the exceptions thereto, must show that the rule adopted for computing the damages was not the true one, or the judgment below will not be reversed. 470.

3. VERDICT ORDERED. The court intimating how it should rule, the defendant declined to go to the jury on any disputed fact. The exception does not bring into contention the ruling intimated. 538.

4. Error must appear upon the face of the exceptions. Every reasonable intendment is to be made in favor of the judgment below. 433.

5. A question cannot be raised in the Supreme Court if it does not appear to have been raised in the County Court. 562.

EXECUTION.

1. **MISTAKE IN.** The levy of an execution, correct, except by mistake it described the judgment as rendered by the County Court when it was rendered by the Supreme Court, is not void. *Ross v. Shurtleff*, 177.

2. **EQUITY OF REDEMPTION.** The levy of an execution, claimed to be void for uncertainty, "on one undivided 12956-21900th part" of an equity of redemption, "subject to the Burke levy," is held valid. *Ib.*

3. The levy was made in 1869; *audita querela* brought to set it aside in 1877; if there was any error it was cured by statute, R. L. ss. 1596, 1598. *Ib.*

4. **INTEREST.** An execution (levied on real estate) bears interest by statute, R. L. s. 1547. *Ib.*

5. A deputy sheriff, holding an original execution at the time he was removed from office, may levy on real estate an alias afterwards issued in the same suit, R. L. s. 860. *Ib.*

6. **ENJOIN.** Court refused to enjoin execution levied on locomotive &c. 235.

7. **DECREE.** Execution issued on a decree in chancery. 242.

8. **PARTNERSHIP PROPERTY** sold on execution issued against one partner. 242.

9. **INJUNCTION** enjoining execution enjoined judgment. 455.

EXECUTORS AND ADMINISTRATORS.

The defendant's testator was surety on a probate bond. The principal on the bond appealed from the decree of the Probate Court fixing the amount of his liability. The County Court heard the case, rendered judgment, returned a certificate to the Probate Court, where a final decree was made. The principal had been removed, and the plaintiff appointed administrator *de bonis non*; the surety had deceased, and the defendant was his executor. *Held*, that the claim upon the bond did not become absolute until the last decree of the Probate Court; and that, the time having expired for presenting claims to commissioners, the plaintiff, under the statute, R. L. s. 2208, having presented it to the executor within one year from the time of the final decree, and to the Probate Court as a contingent claim against the estate of the surety, is entitled to recover in an action of debt. *Atherton, Admr. v. Fullam, Exr.*, 388.

EXEMPT.

1. Products of wife's realty, when. *See* MARRIED WOMAN 1 and p. 18.
2. FORAGE. The exemption of forage is an independent claim or right not conditioned upon the debtor's having the exempt animals to consume such forage ; hence, when the plaintiff owned only an exempt cow and horse, and the defendant, a sheriff, barely left him hay enough to keep them through the winter, and sold a quantity of hay needed to keep all the stock exempted by statute, such sheriff is liable in trespass. *Kimball v. Woodruff*, 229.
3. GIFT of exempt property by husband to wife is not a fraud on creditors. *See* MARRIED WOMAN 7. *Premo v. Hewitt*, 362 ;
4. Nor is the increase of such property attachable on husband's debts. *Ib* ;
5. Nor improvements made by the husband's labor on wife's real estate. *Ib*.

EX PARTE PROCEEDINGS, no presumptions. 525.

FACT, collateral. *See* EVIDENCE 11 and p. 22.

- " misrepresentation of, to insurance company. 151.
- " knowing, but ignorant of the law, when remediless. 330.
- " careless ignorance, remediless. 80, 423.
- " finding none by referees, censured. 69.

FALSE IMPRISONMENT. *See* DAMAGES 1 and p. 358.

FALSE REPRESENTATION. *See* INSURANCE.

FATHER, gift from to daughter. *See* GIFT.

FEEs. *See* CONSTABLE and p. 562 ; ATTORNEY.

- FELLOW SERVANT. *See* RAILROAD 1, 2 and p. 84.

FENCE.

1. If contiguous land owners by *parol agreement* divide the fence between them, such agreement is binding so long as they act under it ; and, if one fails to make his part a legal fence, and the other's cattle escape over it into his field, he has no right to impound them. *Hitchcock v. Tower*, 60.
 2. On resurvey of highway a party who has encroached on it is not entitled to damage for removing his fence. 414.
- FILING DEED in town clerk's office is only *incipient record*. 513.

FILING PLEAS out of time discretionary with trial court. 36.

FINANCIAL CONDITION, fraudulent representations of, by insurance company, vitiates the policy. 526.

FORAGE, *see* **EXEMPT 2** and p. 229.

FORBEARANCE to sue, compromise, &c. 387.

“ opposition to probate of will, compromise, &c. 391.

FOREIGN CORPORATION, service on, *see* **RAILROAD 13**.

FOREIGN CREDITOR. *See* **BANKRUPTCY**.

FOREIGN INSURANCE COMPANY, *see* **INSURANCE**.

FOREIGN JUDGMENT, *see* **JUDGMENT**.

FOREIGN RECEIVER. *See* **INSURANCE**.

FORMER JUDGMENT, *see* **PLEADING 13** p. 434.

FRAUD.

1. Sale fraudulent as to creditors. *See* **EVIDENCE 35** and p. 224.

2. If one of two innocent parties must suffer by the fraud of a third, he who reposed the trust, &c., ought to bear the loss. 257.

3. Gift of exempt property from husband to wife, is not a fraud on creditors. *Premo & Wife v. Hewitt*, 362.

4. As to change of possession,—gift from father to daughter. *See Ross v. Draper*, 404.

5. The fact that the note was not protested is not evidence that it had been fraudulently altered. 409.

6. No **PRESUMPTION** that fraud has entered into any transaction. 539.

7. **UNDUE INFLUENCE** in procuring a will, &c. *See* **CONTRACT 19, 21**; **WILL 6** and p. 391.

8. **FRAUD IN LAW**. No change of possession required of crops, when the mortgagee takes possession of the farm. *See* **MORTGAGE** and p. 535. *See* pp. 224, 362, 404.

9. **FRAUDULENT CLAIM**, compromise of, no consideration. 399.

10. **FRAUDULENT REPRESENTATIONS** by insurance company as to its financial condition, vitiates policy. *See* **MISTAKE**. 526.

FRAUD, STATUTE OF.

If one makes a verbal contract for the sale of his farm, and then repudiates it, he cannot invoke the aid of the Statute of Frauds to enable him to retain what he received under such contract. *Gifford v. Willard*, 36.

1. **FRAUD, ACCIDENT AND MISTAKE STATUTE.** By it appeal allowed from Probate Court, when first appeal was dismissed because wrong bond was filed. 434.

2. Also, from a justice court when the County Court held that the party pleaded in offset over \$20, in good faith. 503.

GENERAL ISSUE. See PLEADING.**GIFT.**

1. **NOTE.** The intestate, a short time before her death, gave a promissory note to the female plaintiff, who was a daughter of the intestate's husband by a former marriage. The daughter worked for her father for some time after her majority ; but no contract was proved that she was to receive pay for her services. The father, by a third person, conveyed his homestead of small value to the intestate. It is stated by the referee as a fact, that they designed, and often talked between themselves, that the said plaintiff should be paid for her services ; that the father so expressed his wish when he conveyed the homestead ; and it was to carry out this purpose that the note was given. *Held*, that there was no declaration of a trust ; no legal consideration for the note ; and as a gift, it rested in promise, not executed. *Rogers v. Rogers*, 73.

2. **DELIVERY.** The plaintiff and her brother lived with their father on his farm. The brother, on account of the infirmities of the father, had the whole management of the farm, and provided for the common table of the entire household. The covered carriage in question was kept, when not in use, in an outhouse on the farm built by the brother at his own expense. The father called the members of the family into the dining-room of the house, and in the presence of all gave the carriage to the plaintiff, he requesting all to witness the gift. The defendant took the carriage off, and claimed that the father afterwards gave it to him. *Held*, that the defendant was not entitled to have the court charge that the gift was invalid for want of a sufficient delivery ; that, if there was, under the facts of this case, a declaration of the gift in plain terms, and a surrender and acceptance of dominion, it was sufficient. *Fletcher v. Fletcher*, 325.

3. **ACCEPTANCE.** The charge should not have been limited to the

element of delivery, but should also have submitted the question of acceptance. *Ib.*

4. JURY. Question of delivery for the jury. *Ib.*

5. Gift of exempt property by husband to wife not a fraud on his creditors. *See* MARRIED WOMAN 7 and p. 362.

6. Getting property insured in wife's name, and allowing insurance to be paid to her, &c., is equivalent to a gift. 365.

7. DELIVERY. ATTACHMENT BY DONOR'S CREDITORS. The law only requires the donee to take such possession as the nature of the property admits of in order to protect it against attachment by the creditors of the donor; thus, a father having purchased a piano for his daughter, moved it into his house, and, some two months afterwards, on her attaining her majority, made her a birthday party, and in a formal and public manner, in the presence of all the guests, gave it to her. After this the daughter used the piano as her own, and all the family treated it as hers, except it was stored in the father's house, and by his consent was attached, without her knowledge. After her marriage she lived at her father's house some, and away some, but the piano was left where it had been, as she had no place to put it. *Held*, that the title to the property passed, and that it was not attachable by the creditors of the donor. *Ross & Wife v. Draper*, 404.

8. PUT ON INQUIRY, officer attaching it as the property of donor. *Ib.*

GOOD FAITH, cannot help innocent purchaser charged with notice of a lien on the property he buys. 367.

" " presumed that one acts in, in bringing suit to County Court. 350.

" " trustee must act in, though matter in his discretion, &c. 243.

" " trustee, acting in, entitled to his costs in accounting, otherwise not. 384.

" " insured must act in, in making his statement of loss. 152.

" " lists as a basis of taxation, when made in, upheld. 454.

" " when it does not aid jurisdiction. 468.

" " party entitled to appeal who pleads over \$20 in offset, in good faith. 503.

GRAND LIST. *See* EVIDENCE. 2.

GROWING CROPS. *See* CHATTEL MORTGAGE and p. 285.

GUARDIAN.

1. A guardian cannot *confirm a deed* made by his ward except by fol-

lowing the regulations prescribed by the statute, obtain a license, and execute a conveyance himself. *Doty v. Hubbard*, 278.

2. Statute of Limitations does not run against a ward *non compos*. 378
3. Accounting in chancery. *See* CHANCERY 14 and p. 383.

See ASSUMPSIT 1.

HABEAS CORPUS, prisoner released on, having been illegally refused an appeal by a justice of the peace. *See* CRIM. LAW 1 and p. 1.

HEIRS do not confirm a deed executed by their mother by merely neglecting to act in the matter. 283.

HIGHWAY.

1. BRIDGE. The defendant was repairing one of its bridges. The plank had been taken up ; and at the close of a day's work its surveyor made a barricade to prevent travelling on the bridge ; the plaintiff, ignorant of its condition, at night drove upon it and was injured. The question being whether the barricade was sufficient, the court charged the jury that if the surveyor "fully discharged the duty of the town, at the close of the day's work, by way of precaution against accident to travellers in the night time, the town is not responsible for this accident, nor liable in this case, although the barricade was rendered insufficient by accident, or malicious interference afterwards." *Held*, no error. *Mullen v. Rutland*, 77.

2. NOTICE. In an action by a husband against a town for loss of service, &c., in consequence of injuries received by his wife through the defect in a highway, nothing can be recovered for *doctoring and nursing the wife, &c.*, where the notice does not specifically claim damages for such *doctoring, &c.*, the wife having recovered for her injuries in another action. *Boyd v. Readsboro*, 163.

3. HIGHWAY OR RAILROAD CROSSING. Railroad liable for injury caused through defect in one. *See* RAILROAD and p. 484.

4. OBSTRUCTING HIGHWAY BY RAILROAD. Railroad liable to party injured. *See* RAILROAD 19 and p. 218.

5. NOTICE for injury not given within twenty days. 385.

6. MORTGAGE. One cannot foreclose, and thereby deprive a town of the control of highway. *See* MORTGAGE 18 and p. 481.

7. RESURVEY. NO APPEAL from the decision of the selectmen. When the selectmen resurvey a highway, thereby establishing the original boundaries, there is no appeal from their decision to the County Court.

The remedy by petition and appointment of commissioners applies only where a road *has been laid out or altered*. *Hogaboom v. Highgate*, 412.

8. **SAME. NO DAMAGES.** Those who have encroached on a highway by fences since the statute of 1858, R. L. s. 3125, are not entitled to damages on a resurvey by selectmen, establishing the original boundaries. *Ib.*

9. **LAYING OUT *through two or more towns*.** The County Court under section 2969, R. L., has jurisdiction where the petition prays for commissioners to establish a highway extending *into two adjoining towns*, although no application had been made to the selectmen, and the laying the highway would require the building of a bridge over a river between the towns. *Platt v. Milton & Colchester*, 490.

10. **NOTICE** (which see) held sufficient as to place. *Fassett v. Roxbury*, 552.

11. **And, as to the bodily injuries.** *Ib.*

12. The charge of the court should be taken as a whole. *Ib.*

13. **NEGLIGENCE.** The question of contributory negligence, as a general rule, cannot resolve itself into one of law, but must be submitted to the jury, with instructions. *Ib.*

14. The terms, "ordinary and common prudence," "ordinary care and prudence," &c., explained. *Ib.*

15. **REASONABLE CERTAINTY** required in notice. *Ib.*

16. **DEFECT OUTSIDE THE LIMITS.** Whether a highway is sufficient or not is a question of fact for the jury ; and there was no error in that the court refused to direct a verdict for the defendant, although the plaintiff's evidence showed that the defect was *six inches outside of the highway*, being a steep embankment twenty-two feet high, without railing or muniment ; that the highway was three rods wide, and the wrought or travelled part thirty-eight feet, level up to the brink ; that the injury occurred in the night, and in consequence of the darkness the plaintiff was unable to see the surroundings, and drove off the brink. *Drew v. Sutton*, 586.

17. To render the town liable it is not necessary that the defect be *in the way*, if it is in such close proximity as to render travelling along the way dangerous. *Ib.*

See CONTRACT.

HUSBAND.

1. Not liable for wife's debt by virtue of his marital relation ; but may be by his joint promise. *Holmes v. Reynolds*, 39.

2. His creditors cannot attach products of wife's realty, when. 18.

3. **AGENT OF WIFE.** She is bound by his contract The rule applied that where one of two innocent parties must suffer by the fraud of a third, &c. *Spaulding v. Drew*, 257.

4. **GIFT to wife of exempt property not a fraud on his creditors.** See **MARRIED WOMAN** 7 and p. 362.

5. Improvements made by his labor on wife's real estate not attachable on his debts. 367.

6. A proper party to a bill in chancery brought by wife against a railroad to recover land damages. 439.

7. **ALIMONY** allowed wife made a lien on husband's real estate. See **MORTGAGE** 25. *Swan v. Swan*. 583.

See **MARRIED WOMAN ; GIFT ; AMENDMENT.** 3.

IGNORANCE OF LAW, knowing facts, remediless. 329.

" " as to giving notice of injury on highway, remediless. 385.

" " facts, from carelessness, remediless. 80, 423.

See **CHANCERY** 1, 2 ; **MORTGAGE** 13 ; **APPEAL** 4, 5.

ILLEGAL CONTRACT, by foreign insurance company, unenforceable See **FIRE INSURANCE** 11 and p. 526.

IMPEACH. One cannot impeach his own witness. 24.

IMPLICATION, repeal of statute by, not favored. 412 ;

" but when the jurisdiction of constables was extended, their duties were also extended by implication. 563 ;

" intent of debtor, as to application of payment. 542.

Implied Contract, see **CONTRACT.**

IMPOUNDING. See **FENCE ; TRESPASS** 1 and p. 184.

IMPRISONMENT, FALSE, action for. 358.

INCREASE of property, as cows, given to the wife, exempt. 362.

INJUNCTION.

1. The court refused to enjoin execution levied on locomotive. *See* PARTNERSHIP and p. 235.

2. BOND. When relief should be sought on bond. 263.

3. Bill to enjoin the collection of a note. *See* CHANCERY and p. 273.

4. Railroad company enjoined till it paid land damages. 438.

5. The plaintiff had recovered judgment against the defendant ; execution had been issued, which expired August 12th, 1876, and was returned to the court on that day. On the 9th day of August, 1876, the defendant brought a bill in chancery : " To enjoin and strictly forbid the said Hazen Campbell . . . his agents, &c., from proceeding further in the collection of *the said execution*," &c. The injunction was : " The said Campbell, &c., . . . are strictly enjoined and prohibited from proceeding further in the collection of *the said execution*," &c. The injunction was made conditional upon the filing of a bond by the defendant. The bond was filed August 12th ; the injunction was served on the present plaintiff August 24th, and on the sheriff, who held the execution, September 13th, all of the same year. It did not appear that the plaintiff or sheriff knew of the injunction until it was served. No alias execution was taken out. In an action on the bond, *held*, that the injunction enjoined the *enforcement of the judgment*, not the execution that had already run out. *Campbell v. Tarbell*, 455.

6. VIOLATION OF. To violate the spirit of an injunction is a breach of the mandate of court. *Ib.*

7. CONSTRUCTION OF. In deciding whether there has been a breach of an injunction, it was important to observe the objects for which the relief was granted. *Ib.*

8. DAMAGES ON BOND. The plaintiff was entitled to recover \$215,—the value of wood and lumber, which he was, clearly, prevented from selling by the injunction ; but not for wood so situated that it could not have been discovered by reasonable diligence, or without *great energy*, or, where an officer would not be negligent if he failed to seize it on execution. *Ib.*

9. DAMAGES ON BOND. The plaintiff having a life estate, the defendant a reversionary interest, in certain woodlands, the latter procured the former to be enjoined by injunction " from cutting down any timber, trees, or wood, standing or growing upon the premises, . . . or in any way disposing of the same (except what may be cut in a husband-like manner for firewood and timber for fencing and ordinary repairs

upon the premises) " and from committing waste or spoil. In an action on the bond, *held*, that the plaintiff was not merely restrained from committing waste ; that he was prohibited from cutting timber for any purpose save those noted in the exception, although it would not be in violation of the rules of good husbandry ; and that he was entitled to such damage as he may have suffered in not cutting such wood as he had a right to cut. *Lillie v. Lillie*, 470.

10. The bond was sealed ; therefore, the action was properly brought in the names of the obligees, whether jointly entitled to the damages or not.

11. After several years the injunction was modified to *such cutting as did not constitute waste* ; but the plaintiffs forebore cutting for fear of violating the order. No damage after the modification could be allowed.

12. COSTS, ATTORNEY 'FEES. The taxable costs, disbursements, and counsel fees, in the main suit,—not the direct result of the injunction,—are not recoverable.

INNOCENT PARTIES, two, loss on him who made loss possible, &c. 170, 257.

INNOCENT PURCHASERS, *see* CHANCERY 3 and p. 165.

INQUIRY, PUT ON, purchaser of premises with one in possession, is, 265;

" of patent right note, not, 330;

" of land held by selectman in his own name, not, 169;

" sheriff, making attachment of piano given by a father to his daughter, and piano left in father's house, &c., is, 404;

" purchaser of equity of redemption with "running clause" in mortgage, is. 423.

INSANE PERSON, *non compos* is. 382.

INSOLVENT ACT, discharge under does not bar debt contracted before its passage. 8.

See BANKRUPTCY ; PAYMENT, APPLICATION OF.

INSURANCE.

1. LIFE. The engagement of the company was : " And the said company do hereby *promise to, and agree, with the insured*, his executors, administrators, or assigns, well and truly to pay" *to the insured, &c.* *Held*, that the action to recover the amount of the policy could be maintained in the name of the intestate's administrators. *Tripp & Bailey v. Insurance Co.*, 100.

2. *Davenport, Admr. v. M. L. Association*, 47 Vt. 528, distinguished. *Ib.*

3. It is not necessary to set out *hæc verba* in the declaration the several conditions in the policy, and then allege performance ; or, to prove that the insured did not die in a duel, or, while employed on a railroad, &c. *Ib.*

4. **WAIVER.** The defendant by its dealings with the intestate in accepting payment on the premiums long after they were due, and by other acts, *waived the condition* in the policy, by which a failure to pay the premiums as soon as due should work a forfeiture. *Ib.*

5. **TENDER.** No tender of the last premium was necessary. *Ib.*

1. **FIRE. WAIVER.** It is well settled, that if a party insured calls upon the insurer to pay his loss, and the latter makes no specific objection to the form or sufficiency of such proofs of loss as are offered, or to the entire neglect to furnish such proofs, *in season* for the claimant to repair his error, but declines to pay the claim upon other grounds, he will be *estopped* from setting up defects in the proof of loss as a defence to the claim, being presumed to have *waived* them ; or, the most that the insurer can claim is, that the *question of waiver* may go to the jury. *Mosley v. Vt. M. F. Ins. Co.*, 142.

2. *Policies are construed liberally in respect to the insured, strictly in respect to the company ;* thus, where the subject of insurance was *only* "goods and groceries," and there was a clause in the policy, that the keeping of gunpowder for sale or on storage "upon or in the *premises* insured," the court held that the meaning of the word, "*premises*," as used in the policy was "lands and tenements" ; that it did not include "goods and groceries" ; and, therefore, if gunpowder had been kept on "premises" not insured, it would not vitiate the policy. *Ib.*

3. So, where the same policy contained this clause : "no camphene, burning fluid," &c., . . . "or any other inflammable liquid" . . . "shall be kept for sale in *any building hereafter insured* in this company," and it was claimed that the plaintiff kept "gin" and "turpentine" the court held it would not take judicial notice that "gin" and "turpentine" were "inflammable liquids" ; that it was a question of fact for the jury ; and gave the same construction to the word, "*building*," as to the word "premises" in its effect upon the policy. *Ib.*

4. **MISREPRESENTATION** *must be material to the risk.* If there is not a stipulation in plain and unambiguous terms in the insurance contract that any misrepresentation of fact, no matter how immaterial, shall render it void, the rule is, that it must be something *material to the risk* ; thus, when the policy included clothing in a store, and the court charged that if the insured "misstated the quantity or value of any of the *kinds*

of these goods,—as the number of overcoats or other articles,—either through mistake or otherwise, it would not vitiate the policy, provided he stated correctly the value of the whole, and all were insurable in the same class and at the same rates” ; *it was held*, no error. *Ib.*

5. **FRAUD in making proof of loss.** If the insured in good faith, and as accurately and fully as he could, stated his loss, a mistake in some particulars would not be fraud. *Ib.*

6. **PROOF IN SUPPORT OF CHARACTER.** In an action on a policy of insurance where the defendant's evidence tended to show that the plaintiff burned his own building, and that he had committed perjury in his proof of loss, evidence of the plaintiff's good character was admissible. *Ib.*

7. **Interest** was properly allowed from a date nearly two months after the loss. *Ib.*

8. **MISTAKE** in some particulars in making proof of loss, if honestly made, does not vitiate the policy. *Ib.*

9. **GIFT TO WIFE.** Getting property insured in name of wife and allowing insurance money to be paid to her is equivalent to a gift. 365.

10. **FOREIGN RECEIVER, INSOLVENT COMPANY.** A foreign receiver of an insolvent insurance company may sue, and sustain an action, in this State, to recover assessments on premium notes, no creditor having intervened to prevent the prosecution of the suit. *Lycoming F. Ins. Co. v. Wright & Son*, 526.

11. **FOREIGN INSURANCE COMPANY**, an action will not lie in favor of, to recover assessments on premium notes, before it has complied with the statute of this State, obtained a license, filed a copy of its by-laws with the secretary of state, &c. *Ib.*

12. The declaration was fatally defective in not alleging that the plaintiff company had obtained a license which was *in force*, to transact insurance business *at the time the contract was entered into*. Without the license required by the statute the company could not enter into a legal contract. Facts necessary to show a legal cause of action should have been averred. *Ib.*

13. **PLEAS.** A plea may by a *direct admission* of facts omitted or obscurely expressed, aid the declaration ; but, if this plea admits that a license had been obtained, it does not admit that it was *in force* when the contract was made. The plea does not *directly admit* that a license had been obtained at any time. *Ib.*

14. **FRAUD.** Fraudulent representations as to the financial condition

of an insurance company, and thereby inducing the defendant to enter into the contract, may be a full defence to an action to recover assessments. *Ib.*

15. Special pleas setting up false representations as to the financial condition of an insurance company, are not bad as amounting to the general issue. *Ib.*

16. A plea is not argumentative in alleging: "Wherefore the said defendants say that said premium note was and is void." *Ib.*

17. BURDEN OF PROOF on insurer, when. 149.

1. INTEREST. An execution levied on real estate bears interest by statute. R. L. s. 1547. 177.

2. Properly allowed against an insurance company from a date two months after the loss. 142.

3. Against a trustee who has misappropriated funds. 171.

4. On lacy, how computed; payments how applied. 462.

See WILL 7, 8.

INTOXICATING LIQUOR, *see* CRIM. LAW and pp. 57, 82, 211, 547, 550.

ISLAND, *see* DEED.

JUDGMENT.

1. An injunction enjoining an execution, enjoins the judgment. 455.

2. MERGER. A debt existing before the passage of an insolvent law, though merged in a judgment after its passage is not barred by a discharge. 8.

3. FOREIGN. MERGER. The plaintiff bank was located in Vermont; one of the defendants was and still is a resident of Vermont, and the other of Louisiana. The plaintiff obtained a judgment by default in a court in New Hampshire, having attached the defendant's real estate situated there; but no personal service of process was made, no notice was given except a constructive one by publication according to the laws of New Hampshire, and no appearance by the defendants; in an action brought upon the same cause of action as the former one, *Held*, that the original cause of action was not merged in the New Hampshire judgment; and that this action could be sustained. *Nat. Bank of St. Johnsbury v. Peabody & Co.*, 492.

4. *McGilvray v. Avery*, 30 Vt. 538, distinguished. *Ib.*

5. RES JUDICATA. Former Judgment. *See* PLEADING 13 and p. 434.

See ESTOPPEL.

JURISDICTION. *See* CHANCERY ; COUNTY COURT ; BANKRUPTCY ; PARTNERSHIP 6 ; RAILROAD 13.

1. JURY referred to in Bill of Rights is the common law jury of twelve men. 1.

2. In case of gift, question of delivery, for the jury. 328.

3. Also, of contributory negligence. 552.

4. Also, whether an agister is negligent. 69.

5. Also, whether highway is sufficient, although defect is outside the legal limits. *Drew v. Sutton*, 586.

JURY, CHARGE TO. *See* CHARGE TO JURY.

JURY, TRIAL BY. *See* CRIM. LAW.

JUSTICE OF THE PEACE, appeal from decision of allowable though no ball offered, 1 ; also, if defendant pleads in offset over \$20 in good faith, 503 ; but the plea must be to all the plaintiffs though husband and wife. 360.

LANDLORD AND TENANT.

1. LEASE SEALED. OFFSET. The plaintiff rented his farm to the defendant by lease under seal, one of the conditions of which was, that the defendant was to board the plaintiff and his wife ; and if either of them were sick, he was to receive extra pay. The plaintiff's wife was injured and the defendant put to additional expense in caring for her. In action of assumpsit, offset was pleaded, and a declaration in book account filed. *Held*, that the defendant, *under his declaration in book account could not recover the charges for his extra services*, as they are dependent upon the conditions in a sealed instrument. *Proctor v. Wiley*, 344.

2. That he could recover certain items of his account, not connected with any of the stipulations in the lease. *Ib*.

3. One of the plaintiff's charges was for the use of a sugar lot. This lot was not included in the written lease of the farm. Parol evidence was admissible to prove that the plaintiff, just before the contract was executed, told the defendant, as an inducement to make the contract, that he could have the use of the sugar place with the farm. *Ib*.

1. LAND DAMAGES. A verbal assignment of a written award for, valid. 167.

2. Railroad company enjoined till it paid, &c. *See* CHANCERY 37 and p. 438. *See* RAILROAD 16.

LEASE SEALED. *See* LANDLORD AND TENANT.

LESSEE, copy of writ left with. *See* ATTACHMENT 5.

LEGACY, cumulative or added. *See* WILL 5 and p. 317.

"LEGACY" may be applied to real estate. 243.

LEVY of execution on equity of redemption. *See* EXECUTION and p. 177 ; on locomotive, *see* PARTNERSHIP and p. 235.

LIBEL.

1. In an action for a libel, where the language used is ambiguous or ironical, the plaintiff's acquaintances may state their understanding as to whom the libelous charge refers, and what it imputes. *Knapp v. Fuller*, 311.

2. The defendant, after suit was brought, published another article referring to the plaintiff by name. It was admissible to show the *animus*, the intention, in publishing the first article. *Ib.*

3. Also, what one of the defendants said, a few days after the first publication, manifesting a hostile feeling towards the plaintiff, was admissible. *Ib.*

LICENSE. *See* INSURANCE.

1. LIEN reserved on standing timber. 65.

2. Lienholder's right without record, superior to that of attaching creditor with notice, 174 ; but not so without notice, 227.

3. And his attachment is not a waiver of his lien. *See* SALES 7 and p. 308.

4. Alimony allowed wife made a lien on husband's real estate. *See* MORTGAGE 25 and p. 588.

5. Legacy charged upon real estate,—an equitable lien. 521.

See PARTNERSHIP ; ATTACHMENT ; RAILROAD.

LIMITATIONS, STATUTE OF.

1. The statute, R. L. s. 495, allowing an action against a school committee who had paid a teacher without a certificate, is *penal* ; and, therefore, such action must be commenced within four years. R. L. s. 1717. *School District v. Brown*, 61.

2. Not a meritorious defence. *See* CHANCERY 34 and p. 273.

3. An award under seal is a specialty. 321.

4. DATE OF WRIT. The taking out of a writ is the commencement of an action to save the Statute of Limitations ; thus, the date of the account was April 12th, 1873, of the writ, January 28th, 1879, of the service, April 21st, 1879. *Held*, that the account was not barred ; that the date of the writ is *prima facie* evidence that it issued at its date. *Chapman v. Goodrich*, 354.

5. AGENT *making the charges*. The defendant cannot leave out of his specification a part of his account,—*items which represent a legal indebtedness*,—and thereby be enabled to plead successfully the Statute of Limitations ; and this is so although the defendant did not intend to trust the plaintiff, the meat having been delivered and charged on books by his agent, but acting within his authority. *Ib*.

6. TRUSTEE, when he cannot plead it. 378.

7. HIGHWAY, one does not gain right by adverse occupancy. 414.

8. PAYMENT equivalent to a new promise. 356.

See CHANCERY 39.

LIST, LISTERS. *See* TAX ; CONSTABLE ; PAUPER.

LOST NOTE. *See* BILLS AND NOTES.

MARRIED WOMAN.

1. RENTS, ISSUES AND PRODUCTS *of her realty, when not attachable*. A husband built a house on a village lot owned by his wife ; the house and lot were exchanged for a farm ; the farm was sold, and the proceeds used in part payment for another farm. The title of the three pieces of land was in the name of the wife. The farm was carried on in her name, and he had no interest in it, except that growing out of his marital relation. *Held*, that the hay cut on the last farm was not attachable on a debt due from the husband for materials used in building the house ; and that the statute, R. L. s. 2324, limits the right to attach the products of the wife's real estate to the products of such of her estate as has been improved by the expenditure of money or material furnished. *Ackley & Wife v. Fish*, 18.

2. MAY SUE AND BE SUED. A count in general assumpsit against husband and wife jointly is held good on demurrer. *Holmes v. Reynolds*, 39.

3. Also, a special count, alleging an indebtedness contracted by the

wife during coverture, in another State, by whose laws she had the legal capacity to contract, to carry on business, and to bind herself in payment; that the debt was for goods delivered to the wife; and that in consideration thereof both defendants promised to pay. *Ib.*

4. A married woman carrying on business in her own name, by Statute R. L. 2321, may sue and be sued. *Ib.*

5. Where the wife may contract, the husband is not liable by virtue of his marital relation; but may be by his joint promise. *Ib.*

6. BOUND by the ACTS of HUSBAND when ACTING as her AGENT. The oratrix owned real estate covered by mortgage, with a decree of foreclosure pending. She and her husband deeded it to two of the defendants, with an agreement *with the husband alone*, that they were to pay the decree, and when the property was sold the proceeds were to be applied to pay the amount of the decree, to pay for the care and management of the property, and an indebtedness due from the husband to one of the defendants. The wife did not know what contract had been made with the defendants except as she was informed by her husband, who procured the deed to be executed and delivered it. She entrusted him with her title deed, and understood that whatever arrangement was to be made with the defendants in relation to the property was to be made by him. *Held*, that the proceeds of the real estate should be applied in accordance with the husband's contract; that the rule applies that where one of two innocent parties must suffer by the fraud of a third, he who has reposed a trust in the fraudulent agent ought to bear the loss; especially as the defendant had no notice except the record, and supposed the husband had a right to make the contract he did. *Spaulding v. Drew*, 253.

7. GIFT OF EXEMPT PROPERTY by husband to wife not a fraud on creditors. The husband owned a homestead and other property exempt from attachment. It was insured in the name of his wife. It burned; and the insurance money, with the knowledge and consent of the husband, was paid to her; and she, with his approbation, managed and treated it, and the property purchased with it, as her own. *Held*, That it was equivalent to a valid gift. *Premo & Wife v. Hewitt*, 382.

8. That property purchased with the insurance money was not attachable on the husband's debts. *Ib.*

9. HER EARNINGS. Nor property purchased with the wife's earnings, when he has allowed her to use them as her separate estate. *Ib.*

10. Nor, the increase of such property, as of cows. *Ib.*

11. And the result is the same though the labor of the husband on

the wife's farm may have helped to some extent to produce the property in contention. *Ib.*

12. R. L. s. 1075, earnings of married women cannot be trustee'd, construed.

13. LAND DAMAGES. Entitled to an injunction against a railroad company, &c., unless it pay. *See* CHANCERY 37 and p. 438.

14. NOTE. *Promise to pay after decease of husband.* The defendant being a married woman executed her promissory note for borrowed money for the *improvement of her separate real estate*. After the death of her husband, she, being *sole*, promised in writing to pay the amount of the note. In an action brought upon the promise, *Held*, that the consideration was ample, and the promise legally binding upon her. *Hubbard v. Bugbee*, 506.

See MORTGAGE 1, 7, 25.

MARSHALLING OF ASSETS. *See* PARTNERSHIP.

MASTER. *See* CHANCERY 9, 10, 11.

MASTER AND SERVANT.

1. MALICIOUS ARREST *of servant to injure the master.* An action may be sustained by a master against one maliciously causing the arrest of his servant when no legal cause of action existed against the servant, and the arrest was for the sole purpose of injuring the master; and, maliciously causing the arrest of a railroad company's engineer while running a train of cars to delay the train and thereby damage the company, is actionable. And, *held*, on demurrer, that it was not necessary to aver what became of the defendant's suit against the servant, if the pleadings admit that it was malicious, false, and hopeless. *St. Johnsbury & L. C. R. R. Co. v. Hunt*, 570.

2. FELLOW SERVANTS. *See* RAILROAD 1 and p. 84.

3. REASONABLE care and prudence, master must exercise, in providing safe machinery. *Ib.*

MENTAL CAPACITY. *See* CONTRACT.

MERGER. *See* JUDGMENT; BANKRUPTCY.

MILL DAM. *See* CHANCERY 8.

MINOR OFFENCES, high crimes, &c. 211.

MISAPPROPRIATION of funds of town by one of the selectmen. *See* CHANCERY 3 and p. 165.

MISLED. *See* CHANCERY 1 ; by one of the selectmen as to giving notice. *See* CONTRACT 18 and p. 385.

MISTAKE. *See* CHANCERY 1, 2, 45 ; MORTGAGE 13, 18 ; APPEAL 4, 5 ; TAX 2 ; INSURANCE 8 ; EXECUTION.

MORTGAGE.

1. **SUBROGATION.** The bill alleged that the orator purchased an equity of redemption,—a farm covered by several mortgages ; that the defendants owned two, the second and fourth, on the premises ; that, as they had foreclosed their first, and the decree about becoming absolute, the orator paid the amount thereof ; that they had purchased the first mortgage on the farm, and the orator having paid them therefor took an assignment to himself ; that he had bought the third mortgage, and it had been assigned to him ; and prayed that the defendants repay to the orator the amount of the decree, and of the first mortgage, so paid to them, and, also, of the third mortgage, or be foreclosed. *Held*, on demurrer to the bill, that it should be dismissed ; that the orator took only the rights of the mortgagor ; and that by payment of a part of the incumbrances, he could not be subrogated to the rights of the incumbrancer whose debts he had paid, and by such subrogation defeat the liens of other incumbrancers whose rights are prior in time to his conveyance of the equity of redemption ; and there would be the same result if the bill were amended stating that the orator held the premises in trust for the benefit of a fifth mortgagee. *Guernsey v. Kendall & Wife*, 201.

2. **SUBROGATION. REINSTATED.** Doctrine of subrogation and its application stated : cannot be invoked when inequitable to do so ; or, if unreasonable delay ; or, if the rights of others have intervened ; or, where no misapprehension of facts ; thus, a prior mortgagee *knowing all the facts*, but supposing that a certain decree in chancery was decisive that the orator's mortgage was void, because the note which it secured was given for a patent right, and said decree had established the invalidity of another note given to the orator at the same time and really for the same patent,—discharged his old mortgage, and took a new one subsequent to the orators ; the defendant, having had two opportunities in court to ask to be subrogated to the rights of the prior mortgagee, but neglected to do so ; the defendant in fact, having paid the mortgage debt, *not to protect his interest in the mortgaged premises, but his interest in certain personal property on the premises*, having, in some arrangement about it which had been attached, obligated himself to pay the debt, and then took his mortgage. *Held*, that the old mortgage could not be reinstated ; that the defendant was not entitled to be subrogated to the rights of the first mortgagee. *Gerrish v. Bragg*, 329.

3. **PATENT RIGHT NOTE.** The presumption is that a note given for a patent right has a legal consideration, where there is no evidence either that the patent was valuable or that it was worthless. The purchaser of such a note before due is not put upon inquiry. *Ib.*

4. **ANSWER.** The question, whether a defendant in a foreclosure suit may be subrogated to the rights of a prior mortgagee, may be raised by *answer*. He is not compelled to resort to a *cross-bill*. *Ib.*

5. **ESTOPPEL.** No one is barred, or estopped, by a judgment, except the parties, or their privies ; thus, the orator owning two notes secured by mortgage, given in exchange for one note, the consideration of which was a patent right, sold one and a proportional part of the mortgage to S. S. sought to foreclose the mortgage without making the orator a party, and was defeated. The orator was not *estopped* by the decree. *Ib.*

6. **RIGHTS OF PURCHASER OF EQUITY OF REDEMPTION.** The purchaser of an equity of redemption by deed without covenants takes the estate charged with the payment of the mortgage debts ; and, it is presumed, in the absence of any special contract, that what he paid, or agreed to pay, was the price less their amount ; but he is not personally liable without agreement to pay the mortgage. *Guernsey v. Kendall & Wife*, 201.

7. **RAILROAD TAKING MORTGAGED LANDS.** A railroad company by a warrantee deed from a mortgagor of lands for railroad purposes takes only the title of the mortgagor, the mortgagee being ignorant of the transaction ; and in a foreclosure proceeding can make only the same defence that the mortgagee could.

And this is so although the railroad could have taken the land under the exercise of the right of eminent domain.

And, although the mortgagor paid the consideration received for the deeds to the mortgagee. *Wade v. Hennessey*, 207.

8. **DEED MAY BE A MORTGAGE.** It is always competent for the grantor in possession to prove that a deed absolute in form is a mortgage. *Perkins v. West*, 265.

9. **RIGHTS OF MORTGAGOR IN POSSESSION THOUGH CONDITION BROKEN. TRESPASS.** The possession of the mortgagor, occupying the barn with her hay, grain and cattle, with no record title, having deeded to the mortgagee with a parol agreement to re-deed on payment of interest and principal within five years, is *superior* to that of the grantee of the mortgagee taking actual possession during the temporary absence of the mortgagor ; and the use of force to exclude the mortgagor is a trespass. *Ib.*

10. **PUT ON INQUIRY.** Possession of the premises by the grantor is

sufficient to put a second grantee on inquiry ; and he is affected with notice. *Ib* ; see, also, pp. 329, 423.

11. VACANT. Premises are not vacated by temporary absence of mortgagor. *Ib*.

12. FORECLOSURE. DESCRIPTION. The description of the premises in a petition to foreclose a mortgage was, "certain land, situate in Bridport and described as follows : it being our home farm, containing about one hundred and eighty acres." *Held*, sufficient on demurrer ; and that the further description, merely referring to certain deeds and records, neither helps nor hurts, and should be rejected. *Howe's Ex. v. Towner*, 315.

13. RUNNING CLAUSE. A mortgage, executed by a husband, his wife and her mother, on property owned jointly, to secure the mortgagee for entering into a recognizance in a bastardy case against the husband, contained, also, the following clause : "*and pay him all sums of money now due or that may be due from us hereafter.*" Both the mortgage and the equity of redemption were assigned. Each of two of the mortgagors owed a separate debt to the mortgagee. The mortgagors did not know that said clause was in the mortgage, as the mortgage was not read to, or by, them ; but they might have read it ; and no fraud was practiced by the mortgagee. *Held*, that both debts were secured. *Bishop v. Allen*, 423.

14. That at all events, the mortgage contained enough to put the assignees of the equity on inquiry. *Ib*.

15. That it was the fault of the mortgagors that they did not know what was in the mortgage ; and equity does not relieve the negligent. *Ib*.

16. *Tabor v. Cilley*, 53 Vt. 487, distinguished. *Ib*.

17. MISTAKE in will not be remedied in equity, if through the mortgagor's own neglect, as that he did not read it, when he had an opportunity to, &c. *Ib*.

18. MISTAKE IN RECORDING. A mistake in the record of a deed of an equity of redemption falls on the purchaser of such equity, rather than on the subsequent assignee of the mortgage, without notice, though overdue when assigned ; thus, in May, 1869, D. executed a mortgage on certain lands to secure his notes ; in November of the same year, the notes and mortgage were assigned to K. as security ; in November, 1872, D. executed a deed to the defendant, in which were these words, "*and an undivided half of the tract I purchased of*"—(D's mortgagee). In the record of the deed the words above quoted were omitted until a second record was made in 1879, while this suit was on trial, in which these

words were included. In 1876 K. re-assigned, after they were due, the notes and mortgage to his assignors, the original mortgagees, who on the same day assigned them to the orator. At the time the notes and mortgage were given, they were left with a third party and were not to be delivered until the land was cleared of incumbrances, and measured, and if it fell short the notes were to be reduced to an amount agreed on,—\$4.00 per acre. After the assignment to the orator, through some misunderstanding, he obtained possession of the notes and mortgage, foreclosed, and the decree became absolute against D. The orator was without actual notice of the deed to the defendant. In a foreclosure proceeding, *held*, that the orator is entitled to a decree against the defendant; that there was no constructive notice: that the filing of a deed is only the *incipient record*; and that when a deed has been recorded and taken from the town clerk's office, it is no part of the files, and the record is decisive of equities. *Potter v. Dooley*, 512.

19. That the decree concludes all equities of D. and of all claiming under him. *Ib.*

20. That the defendant cannot stand on a tax title when the grand list of the town was not offered in evidence. *Ib.*

21. It is doubtful whether any one but D. could insist on the conditions of the contract as to measuring the land, &c.; but his rights and the rights of his grantees are concluded by the decree. *Ib.*

22. HIGHWAY. TOWN. A mortgagee of a farm is not entitled to a decree of foreclosure against a town of its interest in a highway, although it was laid through the mortgaged premises after the execution of the mortgage, the damages paid to the mortgagor, no notice given to the mortgagee, and the property worth less than the debt. *Slicer v. Hydepark*, 481.

23. MORTGAGEE IN POSSESSION. If a mortgagee, after condition broken, takes possession of the premises, and cuts the growing crops, such crops are his; and no change of possession is necessary to secure them against attachment by the creditors of the mortgagor; and this is so although the mortgagor continued to reside in the house on the farm, and the mortgagee, his son, boarded with him while he was cutting and gathering the crops. *Hamblet v. Bliss*, 535.

24. OVERDUE NOTE. Presumption that it is unpaid, when. *Ib.*

25. ALIMONY. DIVORCE. SUBROGATION. After two mortgages had been placed on his farm, the mortgagor's wife obtained a divorce, and \$1750 having been decreed her as alimony, was made a further lien on the farm. These three liens or charges remaining, the parties after

some two years were re-married, first entering into an ante-nuptial agreement by which she was to receive a deed of one-half of the farm, and when he had paid the mortgages the claim for alimony was to be discharged. The deed was executed, but the mortgages were unpaid. They continued to live on the farm for about three years, when he conveyed away his interest, and abandoned her. The owner of the mortgages took possession of the premises and occupied for several years, taking the rents and profits amounting to \$200 per year. A bill being brought to foreclose the mortgages, *Held*, if the husband paid the mortgages the deduction for rents should be at the rate of \$100 per year ; but if the wife paid, it should be \$200 per year ; that is, the use of her half could not be appropriated to pay his debts. *Swan v. Swan*, 583.

26. If she is compelled to pay the mortgages she should be subrogated to the rights of the petitioner. *Ib.*

27. When the mortgages are paid her deed will operate a satisfaction of her decree for alimony. *Ib.*

28. A Court of Chancery has jurisdiction to foreclose a mortgage in whatever form it may exist, as an equitable mortgage. *Ross v. Shurtliff*, 177.

1. CHATTEL MORTGAGE. The owner of land may make a valid chattel mortgage of a growing crop that he has planted, which is superior to the lien acquired by another creditor's subsequent attachment. *Kimball v. Sattley*, 285.

2. GROWING GRASS. The mortgagor of a farm, in possession, and after condition broken, may make a valid chattel mortgage of the growing grass thereon to the mortgagee of the farm, which is superior to the lien acquired by another creditor's subsequent attachment. *Ib.*

3. DESCRIPTION. The description in the mortgage was : "also all the grass and oats and corn now growing on two hundred and thirty acres of said farm," the farm being properly described ; *held, prima facie* sufficient. *Ib.*

4. The words "not exempt from attachment," as used in the act of 1878, but left out of the R. L., were not a restriction or limitation as to personal property that might be mortgaged. *Ib.*

5. Distinction between chattel mortgage and conditional sale. 368.

MOTION, cause on motion remanded for defendant to file declaration for betterments. 58.

" to set aside verdict and for new trial, not sustained. 38.

" to quash pauper proceedings, sustained. 323.

MOTION, to remand case from Supreme Court to allow officer to amend his return, sustained. 400.

“ to quash complaint for selling liquor, not sustained. 550.

“ to dismiss pauper proceedings, not sustained. 522.

“ to quash proceedings for highway. 490.

NEGLIGENCE.

1. GROSS, necessary to make gratuitous bailee liable. *See* BANK and p. 154.

2. BURDEN OF PROOF on owner to show agister negligent. 69.

3. FELLOW SERVANT, railroad liable for neglect of, when. *See* RAILROAD 1 and p. 84.

4. CONFIRMATION, not by neglect, when. 278.

5. RAILROAD CROSSING, negligently constructed, company liable, when. *See* RAILROAD 22 and p. 484.

6. CONTRIBUTORY, question of, for jury. 552 ; *see* p. 586.

7. So, whether agister is negligent. 69.

8. A trustee is liable, if, through his neglect, a debt due to the *cestui* fails. 170.

9. Notice to bridge-builder of negligent construction of culvert is notice to the company. 84.

See PLEADING 1 ; HIGHWAY 11, 17.

NEW TRIAL.

1. The plaintiff admitted that the defendant was entitled to recover \$5 under his plea in offset ; the jury returned a general verdict for the plaintiff for \$8.50, and a special verdict that defendant recover nothing. A motion was made in the County Court to set aside the verdict and for a new trial, which was denied. It will be presumed that the court was satisfied that no error was committed, and that in fact defendant was allowed the \$5. *Gifford v. Willard*, 36.

2. A new trial was denied on the ground that the alleged matter, if established, the court could not say, would change the result. *Bellows v. Sowles*, 391.

See APPEAL 4, 5.

NON-PROTEST. *See* BILLS AND NOTES.

NON-RESIDENT. *See* JUDGMENT ; BANKRUPTCY.

NOTICE.

1. Vendor's lien unrecorded superior to an attaching creditor's with notice. 174.

2. Possession of premises is sufficient to put purchaser on inquiry ; and he is affected with notice. 265.

3. Notice to agent, see pages 84, 293, 350.

4. Party purchasing property with a recorded lien on it, charged with notice. *See* TROVER 3 and p. 367.

5. Attaching creditor bound to take notice, when. 408.

6. The record of deed, which record contained a mistake, is not constructive notice. *See* MORTGAGE 18 and p. 512.

7. Stockholders, to what extent chargeable with notice of affairs of corporation. 136 ; *see* RAILROAD 9.

8. Notice to bridge builder of defective culvert is notice to the company. *See* RAILROAD 1, 2 and p. 84.

9. REASONABLE CERTAINTY, in notice of injury on highway. 554. *See* MARRIED WOMAN 6 ; PAYMENT.

NUDUM PACTUM. *See* CONTRACT and p. 420.

NUISANCE. *See* CRIM. LAW 12 and p. 547.

OFFER TO SELL. 300.

OFFICER. *See* SHERIFF ; CONSTABLE ; TAX ; PAUPER.

OFFSET. *See* SETOFF ; NEW TRIAL.

PARENT AND CHILD. *See* GIFT.

PAROL AGREEMENT. *See* AGREEMENT PAROL.

PAROL. *See* EVIDENCE.

PARTIES. *See* CHANCERY ; PLEADING.

PARTNERSHIP.

1. MARSHALLING OF ASSETS REFUSED. RAILROAD. The defendant railroad and the orators under a partnership arrangement were operating the three lines of road. Defendant B. obtained a judgment against the defendant railroad for injuries received through its neglect, not knowing of the partnership. He levied his execution on an engine,

tender and baggage car, owned by the three companies, and the same were sold to his agent, L. ; and he had also levied upon another engine owned by the same companies, and had advertised it for sale when he was enjoined. A bill having been brought, setting up the superior rights of partnership creditors, *Held*, although the rights of partnership creditors, as a rule in equity, are superior to those of the individual creditors, yet the court will not enjoin, where equities are equal ; or, where, as in this case, it does not clearly appear by allegation or proof, that the partnership indebtedness *existed at the time the property was seized, on execution* ; or, especially, under the special provisions of our statute. R. L. s. 3443, whereby a passenger injured through the negligence of a railroad company has a right in attaching cars, engines, &c., superior to the general equity of the partners. *Railroad Co. v. Bixby et al.*, 235.

2. BILL IN THE NATURE OF A CROSS-BILL. It is decreed that the orator in the cross-bill, defendant B., obtained a valid lien on *one-third* of the engine levied on. *Ib.*

3. But no decree could be made as to the property sold to L., unless he were made a party ; and the validity of that sale would seem wholly a matter of law. *Ib.*

4. The priority of right of partnership creditors exists only in equity, not in law. *Ib.*

5. EXECUTION may issue on the decree. 242.
See PAYMENT, APPLICATION OF.

PATENT RIGHT NOTE. See MORTGAGE 3 and p. 329.

PAUPER.

1. Nothing is presumed when the question is, which of two towns shall support a pauper ; thus, the report showing that the pauper's father was "*chosen*," but did not show that he "*served*," in certain offices named in the statute, R. L. s. 2811, sub. 5, it will not be presumed that he served in office. *Burke v. Westmore*, 213.

2. An authorized person cannot serve an order of removal of a pauper. *Granville v. Hancock*, 323.

3. Under the pauper law, the requisite list of three dollars, and a continuous residence for five years, are both necessary to constitute a legal settlement. *Washington v. Corinth*, 468.

4. APPEAL. An order of removal was made on the 16th of October, 1880, and the warrant of removal served on the defendant the 25th of October, 1880, the officer stating in his return that the pauper's wife was "unable to be moved." On the 10th day of June, 1881, the paupers were

removed and a copy of the warrant left with defendant. *Held*, that the defendant was entitled to an appeal to the term of the County Court next following, June 10th, 1881. *Westminster v. Warren*, 522.

5. No certified copy of the order of removal was filed in the County Court. The copy of appeal contained the warrant of removal with the officer's return; the warrant recited the order of removal; and one of the justices signing the warrant certified that the copy of appeal was "a true copy of the original order of removal, &c., . . . made by us as appears by the original files and records." *Held*, that the defect in the copy of appeal was not such as to warrant a dismissal on motion. *Ib.*

6. DERIVATIVE SETTLEMENT. Under the act of 1865 whereby the listers were directed to set dogs in the grand list at the sum of \$1 each, dogs were "*ratable estate*" within the meaning of the pauper law. *Marshfield v. Middlesex*, 545.

PAYMENT, APPLICATION OF.

1. INTENT OF DEBTOR prevails over that of the creditor as to application of payment; and *it may appear by implication*; thus, a partnership having dissolved, one of the partners succeeding to the business of the firm, an old debtor, without notice of the dissolution, and not having notice through the fault of the successor, continued to buy, and also to make payments supposing them to apply on the partnership debt,—the law will apply them as he intended. *In re Roakes v. Bailey & Newcomb*, 542.

2. On legacy, first to extinguish the interest. *See WILL 7 and p. 462. See TRUSTEE; COUNTY COURT and p. 466.*

PAYMENT, of overdue note, no presumption of. 535.

" equivalent to new promise. 356.

PENAL. *See ACTION ON STATUTES and p. 61.*

PETITION. *See REFERENCE 4, 5; NEW TRIAL; APPEAL.*

PLEADING.

1. VARIANCE. The declaration alleged that the plaintiff's horse was placed in defendant's possession, to be agisted for reasonable reward, and that the defendant so negligently kept the horse that by such negligence the horse was gored by a bull and killed. On trial the plaintiff gave evidence, without objection, that the defendant agreed that he would not put the horse in the same pasture with the bull, but in another lot; but, that he kept them together. *Held*, that there was no variance between the proof and the declaration. *Bailey v. Moulthrop*, 13.

2. Distinction between an action counting on one's negligence, and one based on a breach of contract. *Ib.*

3. TROVER. It seems that trover will not lie for not properly agist-ing a horse. *Ib.*

4. AMOUNTING TO GENERAL ISSUE. A plea setting up a different contract from the one declared on is bad as amounting to the general issue ; thus, the plaintiff averred in his declaration that the defendant railroad received him into its cars to safely transport for *hire and reward*, and that by its negligence he was injured ; the defendant pleaded in bar, in substance, that the plaintiff at the time of the accident was riding with a *free ticket, without charge*, and as consideration thereof assumed all risk of accident. *Held*, bad, as amounting to the general issue ; as a special issue, it does not *directly* deny ; as a traverse, it is an argumentative denial ; and that the defendant having joined in demurrer, the question of defect in the plea may be decided on demurrer. *Kimball v. B. C. & M. R. R. Co.*, 95.

5. See, also, INSURANCE 11 and p. 526.

6. FILING PLEAS OUT OF TIME, a matter wholly in the discretion of the County Court. *Gifford v. Willard*, 36.

7. ARGUMENTATIVE, a plea alleging, "wherefore the said defendants say that said premium note was and is void," is not. 526.

8. QUANTUM MERUIT or VALEBANT, school committee may recover on, for boarding teacher. 43.

9. INSURANCE. DECLARATION. An administrator properly brings suit in his own name to recover the amount of life insurance policy. See INSURANCE and p. 100 ; also p. 526.

10. TIME TO PLEAD, CRIMINAL LAW, respondents, twenty-four hours after copy furnished them. 211.

11. SURETY. Action by surety sustained against one of two principals on a note. 300.

12. DOUBLE PLEA. A plea setting forth two full defences is double and bad on demurrer ; thus, a plea to an action of trespass for taking an ox, alleging that the ox was turned out by the plaintiff for attachment, and, also, an accord and satisfaction after the taking, is double. *Luce v. Hoisington*, 341.

13. RES JUDICATA. A plea of *former judgment* must show that the subject-matter of the present, is the same as that of the previous, litigation ; thus, in the first action the question was whether an appeal from

the Probate Court had been properly taken and entered ; and in the second, whether the petitioner had been deprived of taking an appeal by fraud, accident, or mistake. *Held*, not to be *res judicata*. *Burton v. Barlow's Estate*, 434.

14. **VARIANCE.** Under the statute, R. L. ss. 1247, 1250, allowing the writ of ejectment, there was no *variance*, although the declaration averred seisin in fee in the plaintiff, when he had only a life estate. *Casey v. Casey*, 518.

15. **HOLDER of certificate may sustain action in his own name.** 110.

See CONTRACT ; ASSUMPSIT ; SETOFF ; TRESPASS ; HUSBAND AND WIFE ; INJUNCTION ; LANDLORD AND TENANT ; JUDGMENT ; CHANCERY ; INSURANCE ; RAILROAD 8 ; PRACTICE 5.

POSSESSION, CHANGE OF. *See* CHANGE OF POSSESSION.

POUNDS. *See* TRESPASS 1 ; FENCE.

PRACTICE.

1. **RECOGNIZANCE.** A minute of a recognizance on a petition praying that a judgment rendered by default through mistake be set aside and for new trial, "conditioned as provided by law," is not defective ; but if so, the petition should be retained, and new security ordered. *Collins v. Edson*, 48.

2. **RECOGNIZANCE** for review, if error, when defendant cannot take advantage. 183.

3. **CAUSE** on motion remanded for defendant to file declaration for betterments, in ejectment. 59.

4. **FACTS**, finding none by referees censured. 69.

5. The plaintiff admitted that the defendant was entitled to recover \$5 under his plea in offset ; the jury returned a general verdict for the plaintiff for \$8.50, and a special verdict that defendant recover nothing. A motion was made to the County Court to set aside the verdict and for a new trial, which was denied. The judgment below was affirmed. *Gifford v. Willard*, 36.

6. **EFFECT OF IRRELEVANT TESTIMONY.** The judgment of the court below will not be reversed, though irrelevant testimony was received, if harmless, 348 ; and 411.

See AMENDMENT ; APPEAL ; COUNTY COURT ; CRIMINAL LAW ; PRESUMPTION ; CHANCERY ; REFERENCE ; TRIAL ; EVIDENCE ; CHARGE TO JURY ; NEW TRIAL ; EXCEPTIONS ; PROBATE COURT.

PRESCRIPTION. *See* **ADVERSE POSSESSION** and p. 414.

1. **PRESUMPTION.** *It will be presumed* that a recognizance was properly taken, when, 48 ;

That a verdict was correct, when, 38 ;

That one acts in good faith in bringing suit to County Court, 350 ;

That the County Court found a certain fact, when it could have so found from the evidence, and it could not legally have rendered the judgment it did without such finding. 437.

2. *It will not be presumed*, that the entries in one party's books, when not called for, would be of benefit to the other party, 163 ;

Or, that a pauper *served*, though *chosen*, as lister, 213 ;

Or, that the presumption as to mental capacity is changed, 278 ;

Or, anything in regard to *ex parte* proceedings, 525 ;

Or, that an overdue note uncanceled in the hands of the payee was paid when it fell due, 535 ;

Or, that fraud has entered into any transaction, 539 ;

Or, that anything is criminal ; thus, if an act is susceptible of two interpretations, the one that it is lawful is adopted, 411.

See **BANKRUPTCY** 7.

PRINCIPAL AND AGENT. *See* **AGENT**.

PRINCIPAL AND SURETY. One having signed a note with two principals, and having been compelled to pay it, may sustain a several action against either one of the principals, and recover the amount paid. *Clay v. Severance*, 300.

See **INJUNCTION ; EXECUTORS AND ADMINISTRATORS ; BILLS AND NOTES** 1, 2.

PRIVY. *See* **ESTOPPEL**, and *Railroad v. Hunt*, 570.

PRIORITY OF LIENS. *See* **PARTNERSHIP ; RAILROAD ; ATTACHMENT**.

PROBATE COURT.

In cases appealed to the County Court the practice is to send down a certificate. 388.

See **APPEAL ; EXECUTORS AND ADMINISTRATORS**.

PROCEEDINGS, ex parte, no presumptions. 525.

PROCEEDINGS, in rem, *see* **JUDGMENT ; BANKRUPTCY**.

PROCESS, service on non-resident, attachment of property, notice by publication, &c. *See* **JUDGMENT** and p. 494.

Also, *see* **PAUPER ; RAILROAD** 13 ; **CONSTABLE ; SHERIFF ; ATTACHMENT**.

PROCESS, ABUSE OF. *See* MASTER AND SERVANT.

PROMISSORY NOTES. *See* BILLS AND NOTES; PAYMENT; PRINCIPAL AND SURETY.

PUNCTUATION OF STATUTE. *See* SALES 4 and p. 174.

QUASHED, justice proceedings by *certiorari*. 1.
See MOTION.

RAILROAD.

1. NEGLIGENCE. FELLOW SERVANT. A railroad company is liable in an action on behalf of its fireman killed by the washing out of a culvert, the culvert being in an improper condition resulting from the negligence and carelessness of its bridge-builder and road-master. *Davis, Admr. v. Cen. Vt. R. R. Co.*, 84.

2. The negligence of the bridge-builder and road-master in caring for the culvert in law was the negligence of the defendant; and notice to the former of a defective construction was notice to the latter; hence, it is not a question of whether the servant whose negligence caused the injury and the servant injured were fellow-servants; nor, whether the former was ordinarily skillful; nor, whether the defendant was negligent in employing them. *Ib.*

3. The freshet which washed out the embankment was not so extraordinary as to excuse the defendant from liability. *Ib.*

4. *Free Ticket*, that one was riding on, pleaded as a defence to an action for injury. *Kimball v. B. C. & M. R. R. Co.*, 95.

5. PREFERRED STOCK. DIVIDENDS. Two mortgages resting on the R. & B. R. R. Co., it being operated by the trustees of the second mortgage bondholders, a suit pending to foreclose the first mortgage, and during the pending of this suit a charter having been obtained for the defendant company, in the interest of the second mortgage bondholders, the defendant by corporate vote, under the authority of the charter, issued \$4,300,000 of "preferred or guaranteed stock, commonly called preferred guaranteed stock," also, \$2,500,000 of common stock, to liquidate the first mortgage bonds and other claims resting on the property. The charter provided that the said guaranteed stock should "be entitled to receive dividends from the earnings and income of the corporation"; that it "shall pay and shall be liable to pay such dividends"; that, "until declared, interest shall be added to each dividend"; and that no dividend should be paid on the common stock "until a dividend is made on said preferred stock." The defendant having issued certificates of "scrip dividends" in "settlement of dividends" on the said preferred stock, in an action of *assumpsit* to recover the amount of some of said certificates, *Held*, that a preferred stockholder is not a creditor;

that a creditor's lien is prior to the right of a stockholder ; that a right to a dividend is not a debt ; that dividends on preferred stock are payable only out of net earnings which are applicable to the payment of dividends ; that a stockholder is not entitled to any dividend of the profits until all the debts are paid ; that the stock and property of a corporation is a trust fund pledged for the payment of its debts ; and that there is no right to declare a dividend until there is a fund from which it can properly be made. *Chaffee v. Rutland R. R. Co. & Trustees*, 110.

6. CERTIFICATES. But, the company having issued the certificates without objection by any stockholder or creditor, which certificates were convertible into the company's bonds on demand or at the option of the holder, the company having converted all or nearly all of the certificates into bonds, except the plaintiff's, having ratified them, and never having denied their validity, and having so acted that it is estopped to deny their validity, *general assumpsit, will lie to recover the amount of the certificates, the company on demand having refused both to convert them into bonds or to pay them* ; and this is so although at the time the scrip dividends were issued the net earnings were insufficient to pay them, the current expenses, and the floating debt of the company, said debt having been very largely reduced when this suit was brought, and it not appearing that the same treatment of the plaintiff's certificates with the others would have embarrassed the company. *Ib.*

7. Having issued the certificates, ratified them, and all the other preferred stockholders having received the fruits thereof, *the company itself* cannot plead its own wrong in defence by showing that they were illegally issued, or that it had no authority to exchange bonds for certificates, it not appearing that this was necessary to protect itself from embarrassment, or creditors from loss. *Ib.*

8. HOLDER of certificates can sustain action in his own name. The certificates ran to the holder, went on the market, were purchased by the plaintiff ; and the defendant had always treated him as though an original holder, and the certificates as running to bearer. *Held*, that the plaintiff could sustain the action in his own name ; and that it was not a question of negotiability ; but how the defendant had treated the certificates, &c. *Ib.*

9. STOCKHOLDER. NOTICE. The plaintiff was a stockholder, and so affected by constructive notice to a certain extent of the acts of the company and its officers, but in fact had no part in what was done ; and, hence, stands in no such equal fault as to warrant a denial of remedy. *Ib.*

10. ESTOPPEL. All the issues of certificates were authorized by nearly, if not entirely, unanimous votes of the corporation, followed by

votes of the directors. They were issued from time to time from 1872 to 1875, inclusive. The company never denied but always recognized their validity by its corporate action, the repeated votes of its stockholders and directors, the representations of its officers, authorized to issue them, and by the issuing of new bonds, even after the bringing of this suit, to take up the certificates. *Held*, that it was a ratification ; and that the defendant was estopped from denying their validity. *Ib.*

11. The last two issues of certificates did not contain the convertibility clause ; but they had always been converted into bonds the same as the earlier numbers ; and the president of the defendant,—the officer who had charge of converting them—told the plaintiff, before he purchased, that they were convertible into bonds, and showed him the stockholders' vote to that effect. *Held*, that they should be treated the same as the other certificates. *Ib.*

12. CONSIDERATION. The company cannot now deny the consideration in the certificates, having always treated them as though given in surrender of a dividend actually earned and warranted, and issued in settlement of dividends. *Ib.*

13. TRUSTEE PROCESS. The Cheshire Railroad Company, one of the trustees named in the writ, is a foreign corporation. The process alleged that said company "has an authorized agent resident within the State of Vermont at Bellows Falls, in the town of Rockingham and the county of Windham and said State." Such allegation is sufficient to give the court jurisdiction, when legal service has been made. *Ib.*

14. The office of allegations by a trustees under section 1094, R. L., is not to present for trial the same issues raised and tried between the principal parties ; and allegations for that purpose will be dismissed on motion. *Ib.*

15. Improper use of the term *ultra vires* referred to. *Ib.*

16. TAKING MORTGAGED LAND. A railroad company by a warrantee deed from a mortgagor of lands for railroad purposes takes only the right and title of the mortgagor, the mortgagee being ignorant of the transaction ; and in a foreclosure proceeding can make only the same defence that the mortgagor could. *Wade v. Hennessy*, 207.

17. EMINENT DOMAIN. And this is so although the railroad could have taken the land under the exercise of the right of eminent domain. *Ib.*

18. And, although the mortgagor paid the consideration received for the deeds to the mortgagee. *Ib.*

19. **OBSTRUCTING HIGHWAY.** The defendant railroad is liable for injuries sustained by the plaintiff while travelling on a highway, which injuries were caused by its leaving obstructions on the *margin* of the highway, though it had never been surveyed, but had been used by the travelling public more than twenty years. A highway by dedication may have a margin. *Brownell v. Railroad Co.*, 218.

20. **MARSHALLING OF ASSETS REFUSED.** Partnership creditor not preferred to individual creditor who has been injured through the negligence of railroad's servants, &c. *Railroad Co. v. Bizby*, 235.

21. **LAND DAMAGES.** Company enjoined from running across the oratrix' land unless it pay the land damages. *See* CHANCERY and p. 438.

22. **CROSSING HIGHWAY.** If a railroad company by its servants negligently constructs a crossing over a public highway, and a person without fault is injured in his property while travelling on the crossing by reason of a defect in it, the company is liable in an action to such person. *Mann v. Cen. Vt. R. R. Co.*, 484.

23. **MALICIOUS ARREST** of engineer to delay train, and thereby injure the company, actionable. *See* MASTER AND SERVANT and p. 570.

24. **WOOD AGENT.** *See* EVIDENCE 31.

RATABLE ESTATE, dogs. 545.

RATIFY, *see* NEGLIGENCE 4 and p. 283.

“ act of trustee, by bringing bill in chancery by *cestui*. *See* CHANCERY 3 and p. 170.

“ by railroad company. *See* RAILROAD 10 and p. 134.

REASONABLE time to perform contract. 376.

REASONABLE intendment in favor of judgment below. 433.

REASONABLE certainty in notice of injury on highway. 554.

REASONABLE care and prudence, a duty master owes to servant, in providing safe machinery, &c. 90.

RECEIPT. *See* BANK 1; EVIDENCE.

RECEIVER, FOREIGN, *see* INSURANCE 10 and p. 526.

1. **RECOGNIZANCE.** A record of a justice of the peace showing a recognizance cannot be contradicted. *Owen v. State*, 47.

2. A *recongnizance*; “conditioned as provided by law,” not defective. 48. .

3. **FOR REVIEW.** The memorandum made by the justice of the recognition for review was as follows : " The plaintiff as principal and—as surety recognized to the defendant in the sum of \$275.50 as the law requires for the said Cole's right of a trial of the case at any time within two years from the date of this judgment." The court think this is sufficient ; but if not, the defendants cannot take advantage of the error. *Ross v. Shurtleff*, 177.

RECORD, error in, of mortgage. 512.

RECOMMIT. *See* **REFERENCE** 4, 5 ; **CHANCERY** 9.

RECOUPMENT. *See* **CONTRACT** and p. 377.

REDEMPTION, EQUITY OF. *See* **MORTGAGE** ; **CHANCERY** ; **EXECUTION** (levy on).

REFERENCE.

1. The practice by referees of delineating circumstances, and *finding no facts*, is censured. 69.

2. When there is no exception to the report of a referee the court will not pass upon his ruling in regard to a deposition. *McPhail & Co. v. Gerry*, 174.

3. When the reference is general the case is to be tried on the facts, without reference to the form of pleadings ; hence, the defendant, without written plea, may rely on an award in defence before a referee. *Morse v. Bishop*, 231.

4. **RECOMMIT.** The County Court has no power to recommit the report of a referee after the case has passed to the Supreme Court on exceptions. *Clay v. Severance*, 300.

5. It is only in exceptional cases that the Supreme Court will remand a case to the County Court with direction to recommit the report for further findings, no application having been made in the court below. *Ib.*

6. **AMENDMENT.** The case having been referred, the pleadings could be amended so as to embrace a plea of setoff, if necessary ; but the defendant may show, *in recoupment*, or reduction of the damages, such damages as he has sustained by a breach of the contract. *Dennis v. Stoughton*, 371.

7. **AMENDMENT.** It is the cause of action which is referred ; and such a judgment is to be rendered upon the facts as any legitimate amendment of the declaration will admit of ; thus, in an action of replevin, when husband and wife are joined, if the declaration does not al-

lege that they are husband and wife, and that she is the owner of the property, it may be amended so as to show these facts. *Ross & Wife v. Draper*, 404.

8. The report must show the rule adopted in computing the damage. 470.

See BANKRUPTCY 7 ; INJUNCTION.

REFORM NOTE. *See* CHANCERY 35 and p. 276.

REFUSAL. *See* CONTRACT 12 and p. 300.

REINSTATE. *See* MORTGAGE 2 and p. 329.

REHEARING, when granted by chancellor, after cause has been remanded from Supreme Court. *See* CHANCERY 45 and p. 578.

RELIGIOUS SOCIETY, promissory note signed by trustees of. *See* BILLS AND NOTES 1 and p. 273.

REMOVAL OF PAUPER, order of, by whom served. 323.

“ “ how served. 524.

REPEAL OF STATUTE, by implication, not favored, 414 ; but *see* p. 562.

REPLEVIN, to recover wife's property. 405.

REPRESENTATIONS, FALSE. *See* INSURANCE 15 ; FRAUD.

RES JUDICATA. *See* PLEADING 13 ; JUDGMENT.

RESULTING TRUST. *See* CHANCERY 9 and p. 165.

RESURVEY OF HIGHWAY. *See* HIGHWAY 7 and p. 412.

REVOCATION OF WILL, *by codicil*, *See* WILL 3 and p. 243.

RETURN, on execution levied on an equity of redemption, held sufficient. 179.

“ on copy of writ attaching property. 400.

“ cause remanded to allow return to be amended. *Ib.*

“ construction of, fairly liberal rule adopted. 402.

REVIVAL of debt discharged in bankruptcy. *See* BANKRUPTCY 5.

REVIEW. *See* CHANCERY ; RECOGNIZANCE 3.

RIVER. *See* DEED and p. 475.

RULE 24 in chancery, construed. *See* CHANCERY 47.

SALES.

1. **CONDITIONAL SALE.** The statute in regard to conditional sales has no application to the case. It is not material that the deed should have been ever recorded. *Dickerman v. Ray*, 65.

2. In the statute, R. L. s. 1992, relating to the lien of conditional vendors, the words, "without notice," refer to and qualify the words, "attaching creditors," as well as the words "subsequent purchasers." *McPhail & Co. v. Gerry*, 174.

3. Under the statute the rights of a conditional vendor are superior to those of an attaching creditor *with knowledge of the lien*, though the lien was not recorded within thirty days. It is immaterial from what source the knowledge is obtained. *Ib.*

4. The punctuation of the original act, as passed by the legislature, governs instead of that of the printed copy. *Ib.*

5. **SALE OF ACCOUNTS. IMPLIED WARRANTY. AGENT.** The rule that there is an implied warranty in the sale of accounts that they are due and owing, is not changed by the fact that the vendee employs an agent to pay the money and get the account; and when such vendee has brought suit to collect the account and failed in it, he is entitled to recover what he paid for the account, and his reasonable expenses in such suit. *Kingsley v. Fitts*, 293.

6. The rule that a principal is chargeable with the knowledge of such facts as are known to his agent, is not available as a defence. *Ib.*

7. **CONDITIONAL SALE.** By the conditional sale if the vendee failed to pay the note according to its tenor, he forfeited what he had paid, and the vendor could take the wagon. There was a failure to fully pay; but the vendor allowed the wagon to remain with the vendee; and he accepted payments after the last installment was due. Without making a demand he brought suit to recover the balance of the note, attaching the wagon and holding it by virtue of the attachment until the trial commenced, when he entered a non-suit, and claimed to hold it under the written contract. *Held*, that if a demand were necessary, the bringing of the suit was sufficient. *Matthews v. Lucia*, 308.

8. **WAIVER.** By making the attachment the defendant did not waive his right to the wagon under the conditional sale; nor, was he estopped from asserting his right. *Ib.*

9. Nor did he waive the causes of forfeiture arising from default of payment by accepting payments after the note was due. *Ib.*

9. **CONDITIONAL SALE.** The purchaser of property sold condition-

ally is liable for the full value to the lien-holder although payments had been made towards it by the conditional vendee. *Morgan v. Kidder & Robinson*, 367.

10. Distinction between conditional sale and chattel mortgage. *Ib.*

See TROVER.

1. SCHOOL. VOTER. It is not necessary if one is exempt from taxation that his name be on the grand list, to be a voter in a school meeting. *Brown v. School District*, 43.

2. BOARD AROUND. A school committee can make a legal contract, and thereby bind the district, for a teacher's board, although the district voted at the annual meeting that the teacher should "board around in proportion to the grand list." *Ib.*

The court do not apply the rule, that public officers can not contract with themselves to a school committee; but hold, that, for boarding the teacher, or, furnishing supplies, &c., if there is no fraud, they can recover of the district—on a *quantum meruit* or *valebant*. *Ib.*

3. SUPERINTENDENT. TEACHER. CERTIFICATE. The teacher obtained a certificate in one town, and taught in another town which had elected one a superintendent who was not a voter in town meeting. He, however, served in his office for a while, visited the teacher's school, and promised to "endorse" her certificate; but this he failed to do, having removed from the town, and soon afterwards died. Payment was made to the teacher in March, 1876; this suit was commenced in July, 1880, to recover under the statute of the committee what he had paid, on the ground that he had paid to one who did not have a legal certificate. *Held*, the action can not be sustained. *School Dist. v. Brown*, 61.

4. One is not eligible to the office of superintendent of school unless he is a voter in town meeting. *Ib.*

5. There being no lawful superintendent in the town where the school was taught, the certificate was valid. *R. L. s. 489. Ib.*

6. The statute authorizing a recovery is penal; and the Statute of Limitations is a bar. *Ib.*

SEAL. *See CONSTABLE; STATUTE OF LIMITATIONS 3; LANDLORD AND TENANT 1.*

SEARCH WARRANT. *See TRESPASS 2.*

SELECTMEN, misappropriates property of the town. *See CHANCERY 3 and p. 165.*

SELECTMEN, *one* cannot bind town by misleading party injured on highway, as to when notice should be given. *See* **CONTRACT** 18 and p. 385.

“ no appeal from their decision on resurvey of highway. *See* **HIGHWAY** 7 and p. 412.

SERVANT. *See* **MASTER AND SERVANT.**

SERVICE, fees prepayment of waived if not demanded ; town liable for negligent service of constable, &c. *Dix v. Batchelder*, 562 ; *see*, also, **EXECUTION** ; **CONSTABLE** ; **SHERIFF** ; **ATTACHMENT** ; **PAUPER** ; **JUDGMENT** ; **INJUNCTION** ; **RAILROAD** 13, (trustee process on foreign corporation).

1. **SET-OFF**. Two cases pending between the same parties, the court ordered that the judgments be offset, and execution issue for the balance. 300.

2. Set-off can only be pleaded against all the plaintiffs, though husband and wife. 360.

3. None allowed a trustee who has misappropriated the funds of the *cestui*, 165 ; *see* **USURY** ; **BILLS AND NOTES** 8 ; **LANDLORD AND TENANT** ; **CHARGING OUT** ; **REFERENCE**.

SHERIFF, fees, prepayment waived unless demanded, &c. *Dix v. Batchelder*, 562.

“ removed from office may serve execution. *See* **EXECUTION** and p. 177.

“ only sheriff or constable can serve order of removal of pauper. *See* **PAUPER** and p. 323.

“ return must show what. *See* **ATTACHMENT** 4 and p. 400.

“ return amendable. *See* **AMENDMENT** 1 and p. 400.

“ return, how construed. 402.

“ put on inquiry. 404.

STATUTE, CONSTRUCTION OF.

1. Meaning of word “such,” in clause exempting products of wife’s realty. 20.

“ of “with,” in clause exempting forage, &c. 231.

“ of “may,” in pauper law. 323.

“ of “and” in “ “ 470.

As to construction, interpretation, &c., *see* pp. 418, 534.

2. A special designation of officers who may serve process excludes all others—an order of removal. 324.

3. **PENAL.** A statute (R. L. s. 495,) is penal that allows an action to recover of a committee what he has paid a school teacher who had no certificate. 61.

4. The punctuation of the original act, as passed by the legislature, governs instead of that of printed copy. *McPhail & Co. v. Gerry*, 174.

5. Contracts prohibited by statute are illegal and not enforceable. See **INSURANCE** and p. 533.

6. **REPUGNANCY.** When two statutes are repugnant the one last enacted prevails, and repeals the former so far as the repugnancy extends, but no further. *Hogaboon v. Highgate*, 412.

7. **REPEAL** of, by *implication*, not favored. *Ib.*

8. A statute passed after a transaction, and repealed before suit, does not affect the suit. 438.

9. A statute, extending the jurisdiction, extended by *implication* the duties and obligations of constables. 563.

STATUTES CONSTRUED AND LIMITED.

1. R. L. s. 1673, rights of respondent to an appeal. In re *Kennedy*, 1.

2. R. L. s. 2324, products of wife's realty when not attachable. *Ackley & Wife v. Fish*, 18.

3. R. L. s. 1002, witness act, construed. *Blair v. Ellsworth*; *Pember v. Congdon*, 58, 415.

4. R. L. ss. 523, 2644, voters in school meeting; s. 1717—penalty, Statute of Limitations; s. 489, office of superintendent vacant; s. 495, committee liable if he pays teacher without certificate—construed. *School Dist. v. Brown*, 61.

5. R. L. ss. 3818, 3862, liquor law—construed. *State v. Intox. Liquor*, 82.

6. R. L. s. 1992, vendor's lien, construed. *McPhail & Co. v. Gerry*, 174.

7. R. L. s. 1547—interest on execution, construed. *Ross v. Shurtleff*, 177.

8. R. L. ss. 2596, 1598, defective levy, construed. *Ib.*

9. R. L. s. 3098, rescuing beast being impounded, construed. *Bowman v. Brown*, 184

10. R. L. ss. 3367, 3369, when the owner of lands condemned for railroad purposes is unknown, construed. *Wade v. Hennessy*, 207.

11. R. L. s. 1641, time allowed respondents to plead, construed. *State v. Nichols*, 211.
12. R. L. s. 2811, sub. 5, pauper, having held office, construed. *Burke v. Westmore*, 213
13. R. L. s. 724, special masters in chancery, construed. *Randall v. Randall*, 214.
14. R. L. s. 3443, property held for injuries on railroad, construed. *Railroad Co. v. Bixby*, 235.
15. R. L. s. 1965, chattel mortgage act, construed. *Kimball v. Sattley*, 285.
16. R. L. ss. Statute of Limitations, specialty, construed. *Halnon v. Halnon*, 321.
17. R. L. s. 2835, pauper, order of removal, how served,—construed. *Granville v. Hancock*, 323.
18. R. L. s. 1075, earnings of married woman cannot be trustee, construed. *Premo & Wife v. Hewitt*, 362.
19. R. L. s. 7, “insane persane, *non compos*”; s. 968, Statute of Limitations does not apply to insane,—construed. *Chamberlin v. Estey*, 378.
20. R. L. s. 2208, administrator to pay certain claims if they are presented within one year after becoming absolute—construed. *Atherton v. Fullam*, 388.
21. R. L. ss. 1190, officer's return, and 876, attachment by copy left in the town clerk's office, construed. *Pond v. Baker*, 400.
22. R. L. ss. 2820, resurvey of highway, land damages; 125, possession gains no right in highway; 2940, lay out, &c., petition to County Court,—construed. *Hogaboon v. Highgate*, 412.
23. R. L. s. 1426. County Court power to grant appeal from Probate Court, construed. *Burton v. Barlow's Est.*, 434.
24. Act of 1869, voter in town meeting, construed. *Wilson v. Wheeler*, 446.
25. R. L. s. 1927, computing interest, construed. *Bradford Academy v. Grover*, 462.
26. R. L. s. 821, jurisdiction; matter in demand, construed. *Abbott v. Chase*, 466.

27. R. L. s. 2811, pauper law, settlement,—construed. *Washington v. Corinth*, 468.
28. R. L. s. 2932, laying out highway, damages—construed. *Slicer v. Hydepark*, 481.
29. R. L. ss. 3131, 3132, 3133, penalty for obstructing travel, &c. ; 3377, 3383, railroad crossings, damages, construed. *Mann v. Cen. Vt. R. R. Co.*, 484.
30. R. L. s. laying highway through two or more towns, construed. *Platt v. Milton*, 490.
31. R. L. s. 1061, appeal from judgment of a justice of the peace ; R. L. s. 1428, fraud, accident and mistake statute, construed. *Wilder v. Gilman*, 503.
32. R. L. ss. 1247, 1250, ejectment, construed. *Casey v. Casey*, 518.
33. R. L. s. 2840, pauper, appeal from order of removal, construed. *Westminster v. Warren*, 522.
34. R. L. ss. 3610, 3618, foreign insurance companies, construed. *Lyingcoming Ins. Co. v. Wright & Son*, 526.
35. R. L. s. 2811, (G. S. c. 19, s. 1,) paupers,—list ; Act of 1862, dogs taxable,—construed. *Marshfield v. Middlesex*, 545.
36. R. L. ss. 3836, keeping a nuisance ; 3865, form of complaint ; 3857, amendment of complaints, &c., construed. *State v. Murphy*, 547.
37. R. L. s. 851, Acts of 1879, No. 32, and Gen. St. c. 15, s. 81—duty and liability of constables,—construed. *Dix v. Batchelder and Town of Plainfield*, 562.
38. R. L. s. 1249, ejectment, disclaimer, construed. *Phillips v. Post and Reynolds*, 568.

STENOGRAPHER. *See* EVIDENCE, 30.

STOCK, BANK. *See* BANK 9. STOCK, RAILROAD. *See* RAILROAD 5.

STREAMS. *See* DEED ; MILL DAMS.

SUBROGATION. *See* MORTGAGE ; CHANCERY.

SURETY. *See* PRINCIPAL AND SURETY.

SWORN, certain officers. *See* CONSTABLE ; EVIDENCE.

TAX.

1. Bank stock could not legally be taken and sold on a tax warrant prior to the act of 1882, expressly providing therefor. *Barnes v. Hall*, 420.

2. **MISTAKES IN JUDGMENT** *by the listers do not invalidate list*. The validity of a list as a basis of taxation is always upheld where it has appeared that it was made in good faith and the only errors complained of were the result of mistakes in judgment on the part of town officers ; thus, although it is evident that the listers did not comply with the law in the ascertainment and appraisal of real and personal estate, in neglecting to set in the list \$500 in money that should have been set to a ratable inhabitant, but no intentional wrong or fraud was attempted by them. *Held*, that the list was not thereby invalidated. *Wilson v. Wheeler*, 446.

See EVIDENCE 2; 4.

TAX TITLE. *See MORTGAGE 20 and p. 513.*

TENDER. *See COSTS ; INSURANCE 5.*

TOWN, liable for negligent service of writ by constable. *See CONSTABLE 5 and p. 562 ;*

“ no consideration for vote of. *See CONTRACT 18 and p. 385 ;*

“ selectman misappropriates property of. *See CHANCERY 3 and p. 165 ;*

“ cannot be foreclosed of its right in highway. *See MORTGAGE 18 and p. 481.*

TOWN CLERK must make a record that constables and listers were sworn. 452.

TOWN MEETING. *See EVIDENCE 2, 4 ; TAX.*

TRESPASS.

1. **IMPOUNDING.** When one without force or fraud has taken another's cattle in his own enclosure and is proceeding to impound them, the owner cannot lawfully “ fight himself ” into legal possession, and thereby rescue them, but he must resort to the law ; and this is so although the impounding is without right. *Bowman v. Brown*, 184.

2. **EVIDENCE. PLEADING.** Action, trespass ; pleas, 1st, general issue ; 2d, *son assault demesne* ; 3d, defence of defendant's possession. Replication to the 2d and 3d pleas *de injuria*, without justification under a search warrant. *Held*, that the search warrant was not admissible evidence. *Clark v. Downing*, 259.

3. **ASSAULT.** It may be an assault if one person strikes a horse attached to a wagon in which another person is sitting. *Id.*

See MORTGAGE 9, 23 and pp. 265, 535.

TRIAL.

1. **VERDICT ORDERED.** The plaintiff having presented on trial evidence tending to prove a certain question, the court having intimated how it should rule ; namely, that the facts proved did not constitute fraud in law against creditors, the defendant upon this intimation declining to go to the jury as to any disputed fact, the court ordered a verdict for the plaintiff ; to which the defendant excepted. *Held*, that the exception does not bring into contention the ruling intimated by the court ; that the defendant can only claim, that, admitting all to be true that the plaintiff's evidence tended to prove, he was not entitled to a verdict. *Hamblet v. Bliss*, 535.

2. **BOOKS. EXAMINATION OF.** The question being whether a note signed by the defendant, endorsed by the plaintiff, to a trust company, he afterwards becoming the owner and bringing suit, had been fraudulently altered, and while the treasurer of the company was testifying in chief, the defendant's counsel, on the request of the plaintiff, were stopped by the court from examining the company's books. *Held*, no error ; as it did not *appear* for what purpose the books were being examined ; or, that they were asked for, or, refused on *cross-examination*. *Brainerd v. Draper*, 409.

See BANK 7 ; PRACTICE ; COUNTY COURT ; CRIM. LAW ; JURY.

TROVER.

1. It seems that trover will not lie for not properly agisting a horse. 13.

2. By written contract P. agreed to sell a piece of land to H., and convey when the purchase money was paid. The standing timber was to remain P.'s as security. H., without paying, cut and sold a part of the timber to J., and P. gave notice of his ownership ; thereupon, J. bought P.'s interest in the land and timber, prior to any attachment. Before J.'s deed was recorded, the lumber, not having been delivered, was attached by the creditors of H. *Held*, that J. was the owner of the land, and by legal sequence the lumber ; and that he could follow it and assert his dominion over it. *Dickerman v. Ray*, 65.

3. **DAMAGES.** The plaintiff sold a herd of cattle conditionally, taking a note therefor for \$837.50, and a lien by which they were to remain his until the note was "fully paid." The vendee, without the knowledge of the plaintiff, sold a part of the cattle to the defendants, who paid him, and he paid it to the plaintiff, the plaintiff endorsing it on the note. In an action of trover, the note remaining unpaid, *held*, that the defendants

were liable for the full value ; and that the money paid by them could not be allowed in mitigation of damages. *Morgan v. Kidder & Robinson*, 367.

TRUST RESULTING. See CHANCERY 6 and p. 165.

“ EXPRESS. See WILL 1 and p. 243 ; see, also, GIFT 1 ; TRUSTEE.

1. TRUSTEE, when a fund is left with, to be paid at his discretion, must act in good faith. See WILL 1 and p. 243 ;
- “ accounting in chancery. See MARRIED WOMAN 6 and p. 253 ;
- “ misappropriates the funds. See CHANCERY 3 and p. 165 ;
- “ can make no gain to himself, 165 ;
- “ liable if debt becomes worthless, when, 165.

2. WARD, NON COMPOS. ACCOUNTING. Statute of Limitations. The orator was trustee under a deed of trust, acting from 1865 to 1880. He boarded his ward, who was *non compos mentis*, acted as his guardian, though not legally appointed, and owed him a note of \$800, given in 1864, which was not a part of the trust property. The trust property consisted of real estate, which, on the death of the beneficiary, if he left no children, was to be divided between the heirs of the grantor, the trustee being one of them. The beneficiary having deceased, in settlement of the administration in a Court of Chancery between the trustee and the other heirs, *held*, the trustee could not plead the Statute of Limitations as a bar to the note he owed his ward. *Chamberlin v Estey*, 378.

3. Nothing more than the income of the trust property could be appropriated to the support of the ward until his other property was used up. *Ib.*

4. The annual balance of the trustee's appropriations in behalf of his ward above the income of the trust property the law will apply on said note. *Ib.*

5. Having come into a court of equity the trustee took with him all the incidents of his relations as individual debtor, guardian, &c. *Ib.*

6. COSTS. A trustee having acted honestly, coming into court to render his account, is entitled to his costs, and sometimes his attorney fees ; but the orator sought to avoid his own debt, and omitted to give credits which he could have stated, and thus put the defendants to expense to prove them, the Supreme Court refused to reverse the decision below, allowing neither party costs. *Ib.*

7. If he boards ward he cannot fix the price. *Ib.*

TRUSTEE PROCESS. *See* RAILROAD 13, 14.

ULTRA VIRES. *See* RAILROAD 15.

UNDUE INFLUENCE. *See* CONTRACT 19 and p. 391.

USURY. A plea in set-off is allowable against a claim for usury. *Blair, Admr. v. Ellsworth*, 415.

VARIANCE. *See* PLEADING 1, 14.

VERDICT. *See* TRIAL 1; GIFT 2; HIGHWAY 17; PRACTICE.

VOTER. *See* CONSTABLE 2; SCHOOL.

VOTE OF TOWN, no consideration for. *See* CONTRACT 18 and p. 385.

WAGES. *See* EVIDENCE and p. 21.

WAIVER, by life insurance company, forfeiture clause. 100.

“ by fire insurance company, proof of loss. 142.

“ prepayment of fees by officer. 562.

“ lien holder does not waive his lien by attaching. 308. *See* CONSTABLE; INSURANCE; SALES 8; ESTOPPEL.

WARD. *See* TRUSTEE 2; CONTRACT and p. 278.

WARRANTY IMPLIED. *See* SALES 5.

WIDOW, written promise to pay note given while married binding. 506.

WILL.

1. TRUST. DISCRETION *as to Payment, WHEN controlled by the COURT.* The testator willed both realty and personalty to each of his two sons. Afterwards, being dissatisfied with the conduct of one of them, he used the following words in a codicil to the will: “I do hereby revoke the said legacies by my said will given to my said son, Jerome C. Bacon, and I do give to my son, Delos M. Bacon, all of said legacies *in trust*, as follows: that the same be kept by the said Delos M. until in the judgment of the said Delos M. the said Jerome C. shall prove himself worthy of receiving the same, and then and not till then to deliver the same to the said Jerome C. Bacon. It is further my will that if my said son Delos M., shall not at any time judge it best to deliver said property to my said son, Jerome C., that the same shall be and remain the property of said son, Delos M., and his heirs forever.” A bill having been brought by the beneficiary to compel a surrender of the trust estate, *Held*, it is an *express trust* for the benefit of the orator, on condition that he proves himself worthy to have it executed in his favor, of which worthiness the trustee is made the judge. *Bacon v. Bacon*, 243.

2. **HIS MOTIVES** *may be inquired into.* The trustee cannot exercise his discretion and judgment from fraudulent, selfish, or improper motives ; nor can he refuse to exercise them from such motives ; but he must act *bona fide*, with a simple view to carry out the intention of the testator ; and the court will control his judgment and discretion to the extent of compelling an honest exercise thereof. *Ib.*

3. **REVOCATION.** WORD "LEGACY" *may be applied to real estate ;* and, the testator having revoked "the said legacies," revoked the entire will by which realty was bequeathed to the orator.

4. **PLEADING.** The bill is bad on demurrer ; because, there is no allegation that the debts of the estate had been paid ; or, that the trust estate was in the possession of the trustee, and it appearing that the testator's estate was unsettled in the Probate Court. *Ib.*

5. **LEGACY.** The will contained the following : " If there should be anything remaining of my estate after paying the above legacies, then it is my will that there be paid to the children of the said Martha who may be then living, a sum not to exceed two hundred dollars each, and that the residue and remainder of my estate be divided equally to such of my grandchildren as may be living at the time of such division." The codicil provided : " It is further my will that each of the children of my daughter, Martha Scott, have five hundred dollars out of my estate, *in addition* to the amount given to them in my said will." *Held*, that the legacies given by the codicil were cumulative or added legacies, and subject to all the conditions of the previous legacies. *Barnes v. Hanks*, 317.

6. **PROBATE OF WILL**, opposition to ; compromised, action on promise to pay for forbearance. *See* CONTRACT 19 and p. 391.

7. **INTEREST ON LEGACY.** The will contained this clause : " I give and bequeath to my daughter, ————— one thousand dollars, to be paid on her marriage or when she arrives at age, with interest after, at her option." The will was executed in 1848 ; the legatee attained her majority in 1849, and was married in 1853 ; the testator died in 1854. *Held*, that the legacy drew interest as soon as the daughter arrived at age. *Bradford Academy v. Grover*, 462.

8. The legacy bears simple interest ; and the payments should be applied when made, first, to extinguish the interest, and then the principal sum. *Ib.*

9. **WILL AMBULATORY.** *Ib.*

10. **INTEREST. VESTED. CONDITION PRECEDENT.** In an action of ejectment between two brothers,—the question being as to the owner-

ship of a small piece of land, and this turned on the following clause in their father's will : " I give and devise to my beloved son John Casey the home farm, &c. . . . for and during his natural life with remainder over to his two sons—; and at his decease I give the same to them and their heirs forever ; and this *legacy is given upon the express condition that the said John Casey pay to my son Michael Casey the sum of seven hundred dollars on or before the first day of April after my decease.*" The \$700 had not been paid. *Held*, that the intent of the testator should govern ; that the title to the real estate *vested* in the devisee on the death of the testator ; and that Michael had only an *equitable lien* on the real estate. *Casey v. Casey*, 518.

1. WITNESS, party cannot impeach his own witness, 24 ;
 " if drunk may be shown to discredit him, 24 ;
 " one party deceased, the other party not a witness, 58, 415.

2. DUMB. The plaintiff was a legal witness, though *dumb, uneducated in the use of signs*, and only able to assent or dissent in answer to a direct question by a nod or shake of the head ; but the disability detracts from the weight of the testimony, and the jury should have been so instructed. *Quinn v. Halbert*, 224.

3. WIFE. A note having been transferred, an action having been brought in the name of the holder, the wife of the payee may be a witness for the maker, it not appearing affirmatively that her husband had any interest in the event of the suit, and her testimony not relating to any matter that would be a breach of marital confidence. *Armstrong v. Noble*, 428.

See EVIDENCE 16, 18, 29, 30.

WRIT, DATE OF, *see* LIMITATION. STATUTE OF.

Ex. G. a. a.

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